(24,603)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 385.

ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT H. PEERY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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upon one of defendant's locomotive engines which was then and there being run by the defendants in a northerly direction along said line and at a point between said stations of Krebs and Boaz, and that while the said locomotive engine, with the plaintiff thereon in the performance of his duties, was being thus run and operated, the defendant and certain of its servants and agents in charge thereof carelessly ran another of defendant's locomotive engines along and over said track and in a northerly direction and up to and against the engine upon which the plaintiff was riding and carelessly caused said two engines to collide with great force and violence and carelessly caused the same to be broken and crushed and carelessly caused the plaintiff to be caught in said collision and wreckage and then and there very severely injured; that said collision and injuries were caused through the carelessness of the defendant and its servants and agents in charge of said other engine and that under and pursuant to the common law of the State of Kentucky the defendant was liable and responsible for the negligent acts of the employes in charge of said other engine; that the plaintiff at no time knew, and that he had no means of knowing, of the fact that said other engine was approaching the engine upon which the plaintiff was riding and was likely to collide with the same.

4 III.

The plaintiff further states and alleges that at the time of said accident he was thirty-eight years of age and an experienced and capable railroad man; that he had been engaged exclusively in railroading for many years and that he was earning as such conductor and was capable of earning wages averaging at least one hundred and twenty dollars per month; that previous to said accident he had always been in good health; that in and by said accident he was very severely and permanently injured upon and about his chest and back and one of his shoulders; that his collar bone was broken; that he received a very severe nervous shock; that he has been totally disabled and incapaciated ever since said accident and has continuously suffered great pain and anguish both of body and mind and that the injuries thus received, as the plaintiff is informed and verily believes are permanent and that he will, during the rest of his life, and in a very large degree, be disabled and incapacitated and as he is informed and verily believes he will never again be able to engage in any lucrative occupation, save and except in a slight degree and as he is informed and verily believes he will always suffer some pain and anguish both of body and mind.

IV.

The plaintiff further states and alleges that for the reasons aforesaid he has been damaged by the defendant in the sum of twenty-five thousand dollars.

5 Wherefore plaintiff demands judgment against the defendant for the sum of twenty-five thousand dollars and for his costs and disbursements herein.

SAMUEL A. ANDERSON.
Attorney for Plaintiff.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

ROBERT H. PEERY, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Answer.

The defendant, for its answer to the complaint herein:

I.

Admits that it has been and is a corporation as alleged in the complaint, and owned and operated a line of railroad into and through the States mentioned in the complaint, which railroad is used both for handling intrastate and interstate commerce.

II.

Admits that on or about the 8th day of December, 1911, the plaintiff was in the employ of the defendant Company for hire as a freight conductor, and that on said day, while the plaintiff was upon one of the defendant's trains, at a point between the stations of Krebs and Boaz, the plaintiff was injured by a collision between the train he was on and another train then being operated by the defendant.

III.

Denies that said collision and injury were caused by the carelessness or negligence of the defendant, or its servants and
6 agents, other than the plaintiff, and alleges that said accident was caused or contributed to by the negligence of the plaintiff.

IV.

As to the age of the plaintiff and the extent of his injuries the defendant denies any knowledge or information sufficient to form a belief.

V.

Except as herein admitted, the defendant denies each and every allegation, matter and thing contained in the complaint.

Wherefore the defendant asks that the plaintiff take nothing by this action, and for its costs and disbursements.

BUTLER & MITCHELL,
Attorneys for Defendant.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

ROBERT H. PEERY, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Reply.

The plaintiff for his reply to the answer of the defendant in the above entitled action, denies each and every allegation in said answer contained, save and excepts such parts or portions as constitute admissions of allegations contained in the complaint.

SAMUEL A. ANDERSON,
Attorney for Plaintiff.

7 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

ROBERT H. PEERY, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

This case came on for trial before Hon. William Louis Kelly, J., with a jury on the 18th day of February, 1914, Samuel A. Anderson appearing on behalf of plaintiff and Butler & Mitchell (George Hoke) appearing on behalf of defendant.

Jury sworn and case opened by Mr. Anderson.

ROBERT H. PEERY, sworn in his own behalf, testified:

By Mr. Anderson:

Q. Your name is Robert H. Peery, I believe?
A. Yes, sir.
Q. How old are you Mr. Perry?
A. Forty years old.
Q. When was your birthday?
A. September 1st.
Q. Your accident occurred on the 8th of December, 1911?
A. Yes, sir.
Q. At that time you were thirty-eight?
A. Thirty-eight years old.

Q. Your home is in Paducah, Kentucky?

A. Yes, sir.

Q. Admittedly, I think, you were in the employ of the defendant as a freight conductor at the time this accident occurred?

A. Yes, sir.

Q. How long had you been in the employ of the defendant as a freight conductor?

A. Since the 7th of July, 1907.

8 Q. How much of that period between July, 1907, and December, 1911, as near as you can now remember, did you work for the defendant as freight conductor?

A. Well, I was a portion of the time during the summer season—well, say from June to August that business was so slack that I had to go back to flagging.

Q. By flagging you mean braking?

A. Braking, yes, sir.

Q. But with the exception of the summer season you have spoken of, did you work as conductor?

A. Yes, sir, worked as extra conductor and also then as regular conductor as the business increased.

Q. Extra conductor first and then regular conductor later on?

A. Yes, sir.

Q. By regular conductor you mean you would have a regularly assigned run?

A. Yes, sir.

Q. When did you go on as regular conductor?

A. Well, I don't think that I had a regular turn during the winter of 1907 and spring of 1908. Business fell off in 1907, and I don't think I had a regular turn that winter, but every winter following I had a regular turn all winter.

Q. That would be the winter of——

A. 1908 and 1909 and 1910 up until I got hurt.

Q. What were your wages as regular conductor, what was your average a month?

A. Why as regular conductor I would average about $125 or $130 on the turn around.

9 Q. What had been your principal run during the four years you were working as conductor?

A. I was on what was known as the Paducah and Fulton turn around principally.

Q. And when you were not on the Paducah and Fulton turn around, what was your run as conductor?

A. Why sometimes I would take local freight 191 and 192 as far as Dyersburg, Tennessee.

Q. From Paducah?

A. Yes, sir.

Q. Then does that mean that you would run between Paducah and Dyersburg, Tennessee?

A. That means I would run out of Paducah as 191 and return to Paducah the following day as 192.

Q. Running to and from Dyersburg, Tennessee?

A. Yes, sir.

Q. But the most of your time you were on the turn around run?

A. Yes, sir.

Q. Did you ever work on what I spoke of as manifest trains?

A. Yes, sir, I was assigned just a little while before I got hurt to what was known as the Jackson 155 and 60; that is, it was 155 out of Tucker to Fulton, and generally ran extra from Fulton to Jackson and then left Jackson the following day, we would come back to Fulton as a section of Number 60, and ordinarily, out of Fulton then into Paducah as 180.

Q. And Jackson is in the State of Tennessee?

10 A. Yes, sir.

Q. Now with reference to the Illinois Central Line, one Illinois Central Line ran from Chicago to Fulton through Cairo, Illinois, down through Fulton south to New Orleans, Louisiana, did it not?

A. Yes, sir.

Q. And that line runs when it leaves Cairo, at the lower end of Illinois, south or a little southeast and through Fulton?

A. Yes, sir.

Q. And another line runs from Louisville, Kentucky, down through Paducah, Fulton and south through Tennessee?

A. Yes, sir.

Q. At the time this accident occurred, or at any time, what other railroad company, if any, had any railroad trackage running into Fulton from any direction?

A. There wasn't any.

Q. What other lines of the Illinois Central, if any, were there excepting lines running from Fulton and Paducah to Louisville and from Fulton up to Cairo and Chicago, and from Fulton down through Jackson to Birmingham, and from Fulton down through Memphis south; were there any other railroad tracks running in?

A. No, sir.

Q. How large a place was Fulton?

A. I suppose something like three or four thousand inhabitants; I don't know exactly.

Q. How large a place is Paducah?

11 A. I suppose something like 25,000.

Q. Locate Paducah in reference to the north Kentucky line.

A. Paducah is just over the Ohio river; that is, it is on the banks of the Ohio, crossing the Ohio river, dividing the states of Kentucky and Illinois.

Q. Where is Fulton?

A. Fulton is on the Kentucky and Tennessee line.

Q. That is the southern side?

A. That is the southern side of Kentucky.

Q. And is Fulton all on the Kentucky side, or what is the fact?

Objected to as no foundation laid.

Q. You know where the Tennessee line is down there, I suppose, over which this road passes?

A. Yes, sir.

Q. What is the fact as to whether buildings in Fulton are on one side of the line or on both sides?

Objected to as no foundation laid.

The Court: Do you want them to bring in the geography to tell where the line runs?

Mr. Hoke: No.

Q. Do you remember what there is there in Fulton on the Kentucky line connected in some way with the operation of trains down there, some bridge or viaduct?

A. Why the division between Kentucky and Tennessee ordinarily is a street.

Q. Do you know where the line is?

A. Yes, sir.

Q. Are there any buildings down there, houses and business places, things of that sort south of the Kentucky line in Tennessee?

12

Objected to as no foundation laid.

Mr. Anderson: I have asked if there were any buildings there. Now I want to know whether the town that is there together is all on the Kentucky side or part of it over on the Tennessee side.

Mr. Hoke: Well, all right, I won't object.

Q. How is that?

A. The state line divides the town something near half; possibly a little more on the Kentucky side, or possibly a little more on the Tennessee side.

Q. Do you happen to know whether there is a different name given to the two parts that are on each side of the state line?

A. I don't know.

Q. What did you always hear it called—as one town of Fulton?

A. Called it Fulton.

Q. Now about the defendant company's railroad yard, do they have yards at Fulton?

A. Yes, sir.

Q. Where are they with reference to the state line?

A. Well, their main yard, known as the New Yard, is wholly in the state of Kentucky, but they have other tracks, that they store cars on, which are in the State of Tennessee.

Q. The passenger depot at Fulton, is that on the Kentucky side or on the Tennessee side?

A. On the Kentucky side.

Q. How near the line, do you know?

13

A. Something like three blocks.

Q. How near to the Tennessee line does the New Yard extend?

A. The state line comes to about the overhead bridge, which, as I remember now, from the switch lead—I mean the switch of the main

line lead hitting the yard is something like 100 yards. That is, the state line is south of the main yards, something like 100 yards.

Q. Now trains operate over the lines running into Fulton from the north and going out of Fulton south daily and at night?

A. There were freight trains there in large numbers frequently, day and night, yes, sir.

Q. Passenger and freight?

A. Yes, sir.

Q. Taking up, now, the train that you had the day you were hurt—what place did you start from?

A. Started from Paducah, Kentucky.

Q. What time did you start out of Paducah with your train?

A. As I remember it now, we left Paducah at 11:45.

Q. In the morning?

A. In the morning. yes, sir.

Q. Your crew, I suppose, was made up of the usual men—engineer. fireman, and conductor and two brakemen?

A. Yes, sir.

Q. You called one of the brakemen a flagman?

A. Yes, sir.

14 Q. By the way, so as to have it clear, which one is the flagman, the one that follows the engine or the rear man?

A. The rear man. The rear man is designated as flagman.

Q. Did you make up your train in the Paducah yards?

A. No, sir.

Q. Did the switching crews make up the trains for the conductor?

A. Yes, sir.

Q. Then where did you find your train when you went down into the yards?

A. Found it on track number 1 in the south yard.

Q. And how large a train was it?

A. It consisted of some fourteen to sixteen cars, I don't remember just how many.

Q. What kind of cars?

A. They were gondolas, coal cars.

Q. By gondolas you mean these open cars as distinguished from flat cars and box cars?

A. Yes, sir.

Q. That have boxes coming up three or four feet?

A. Yes, sir.

Q. Loaded or empty?

A. Loaded cars.

Q. What were they loaded with?

A. Coal.

Q. Was your caboose on the front when you went down,

15 or do you put the caboose on with your crew?

A. I don't just remember whether it was on or not, but the switch crew put it on if it was not on.

Q. When you are ready to take out a train are you called by a call boy?

A. Yes, sir.

Q. What was your first work when you went down into the yards, what was the first thing you had to do?

A. Take my train book and check the train; that is, take the number of each car and the initial of the cars and also the kind of cars.

Q. Your train book was what?

A. It was a book that we kept as our conductors' record.

Q. Furnished to you by whom?

A. By the railroad company.

Q. And a book to hold the record of one train or of many?

A. Why it would hold a great many trains.

Q. And is that the book in which you kept your records as conductor in charge of your trains?

A. Yes, sir.

Q. Use it until you would fill it?

A. Yes, sir.

Q. What was the arrangement of the book? Was it arranged each page in columns?

A. Yes, sir.

Q. And in making up that train record, would you use just one page and one side, or would the record of that train extend
16 across both pages as you opened the book?

A. Extend across both pages.

Q. And you had names printed at the top designating what was to go into each column?

A. Yes, sir.

Q. What was the first column for?

A. The first was the initials.

Q. What was the second column for?

A. The number of the car.

Q. What was the third column for?

A. The kind of cars, as I remember it now.

Q. Did you have a column for contents?

A. Yes, sir.

Q. Was that the next, or do you remember?

A. I don't think so; I think the tonnage came next—gross tonnage.

Q. And did you have a column also where you were required as conductor to enter the destination?

A. Yes, sir.

Q. Of each car?

A. Yes, sir.

Q. Now what columns would you fill up as you went along by your train or checked up in your train book?

A. I would just take the initial and the number and kind of cars.

Q. When you did that, what was your next duty?

A. Our next duty then was to go to the bill clerk and call off our initials and numbers of the cars in the train.

17 Q. Call them off to him?

A. Yes, sir.

Q. And what work did he do in connection with your calling off the numbers and things of that sort?

A. He would then get the corresponding waybills; that is, the waybill to correspond with that number.

Q. In other words, did a waybill accompany each loaded car?

A. Yes, sir.

Q. If you had an empty car, would you have any waybill to that?

A. Why sometimes we would have waybills for empty cars and sometimes not.

Q. Did he make a record in the book?

A. Yes, sir.

Q. When he got through making his record, what if anything did you have to do with the waybills?

A. I would then take the waybills and compare the numbers and initials with what I had, to find if I had made any mistake, and also would take the contents and destination and gross tonnage of the car.

Q. And put those down in the appropriate columns in your train book?

A. Yes, sir.

Q. And then what became of the waybills when you would do that?

A. I would take the waybills with me, they accompanied the cars.

18 Q. And did you do so on this occasion?

A. Yes, sir.

Q. And carried your train book with you?

A. Yes, sir.

Q. By the way, would you keep that train book until it was filled?

A. Yes, sir.

Q. Having done these preliminary duties, would you then be ready to start out?

A. Yes, sir.

Q. What time did you get into Fulton with this train?

A. About 3:15 or 3:20 P. M. is my recollection.

Q. That same day?

A. Yes, sir.

Q. Did you leave any cars out of your train at any way station between Paducah and Fulton?

A. No, sir.

Q. Where did you leave your train when you got to Fulton?

A. Left it in the New Yard.

Q. What did you then do with your engine and caboose?

A. I then had instructions from the yardmaster to pick up a pile-driver and outfit and also to send my head brakeman to the round-house and get engine 367.

Q. So that when you started back from Fulton to Paducah your train was made up of your engine and engine 367?

A. Yes, sir.

Q. And the pile-driver outfit?

19 A. Yes, sir, pile-driver and outfit.

Q. And your caboose?

A. Yes, sir.

Q. What was the pile-driver and outfit? Describe it.

A. The pile-driver was a piece of machinery that railroad companies use for driving piling or posts on trestles; and of course there is ordinarily a considerable amount of equipment that goes along with —. The pile-driver is mounted on a flat car, and the other stuff was loaded on additional flat cars.

Q. How many flat cars were there in addition to the flat car upon which the pile-driver was mounted?

A. As I remember now, there was three.

Q. Did you have anything else to take back?

A. No, sir.

Q. Same crew go back with you?

A. Yes, sir.

Q. Now, what was your run at this time?

A. I was assigned to what we call the Paducah and Fulton turn around.

Q. What was your starting terminal?

A. Paducah.

Q. What was your ending terminal?

A. Paducah.

Q. And what became of your train book?

A. It was lost in the wreck.

Q. You have never seen it since?

A. No, sir.

Q. The waybills, I suppose, you deliver to the proper clerk down at Fulton?

20 A. Yes, sir.

Q. And do you know, in the course of the work, what becomes of the waybills, where they finally go?

A. Yes, sir.

Q. Where?

A. The waybill accompanies a car to its destination and there the agent at that point, when he has finished with the waybill, sends it to the auditor of freight receipts, in Chicago.

Q. There it is supposed to be kept on file?

(No answer.)

Mr. Anderson (to Mr. Hoke:) Have you got the waybills with you?

Mr. Hoke: No, I have just got the wheel report of that train.

Q. Did you make up a wheel report of this train on your way down to Fulton?

A. Yes, sir.

Q. Was that part of your duties?

A. Yes, sir.

Q. And is that delivered to the same agent at Fulton?

A. Deliver that with the waybills.

Q. At Fulton?

A. Yes, sir.

Q. Does the wheel report show the destination?

A. Yes, sir.

Q. I show you Pl'ff's Ex. A—it has been handed to me as your

wheel report. Will you examine it carefully to see if you can tell us if that is the wheel report of this very train? Is that the wheel report?

21 A. Yes, sir.

Q. What state is Memphis in mentioned on the wheel report?

A. State of Tennessee.

Q. What state is Sardis?

A. Mississippi.

Q. "Jaxon" what is that?

A. There is something else out there; you see they have Jackson, Tennessee, and Jackson, Mississippi, and on there we put an M to the right of 10 to designate whether it is Tennessee or Mississippi.

Q. Is that the way you spell that word Jackson—J-a-x-o-n?

A. That is our abbreviation.

Q. So the letter M means Mississippi?

A. Yes, sir.

Q. I notice a word here that is partly covered up; I can see "Green"—what is that?

A. Greenville, I guess, Mississippi.

Q. There is no station you know of known as Green on the line?

A. No, sir.

Q. Is this wheel report as made out correct?

A. Yes, sir, I guess so.

Q. I mean, you are required to make it out correct at the time?

A. Yes, sir.

Pl'ff's Exhibit A was here introduced in evidence.

Q. The wheel report in substance shows train extra number 876——

A. Yes, sir.

22 Q. Run by Conductor Robert H. Peery. Left Paducah December 8th, 1911, at 11:40 A. M., arrived at Fulton December 8th, 1911, at 3:15 P. M., caboose numbered 98171, car initials—eleven in number—as "I C," one as "C & O," one as "P R R"; showing twelve of the cars in the train as loaded and two as empty, and showing final destination, as per waybill, of two of the cars, with the initials, "I C" as Tennessee division—is that what that means,—division?

A. Yes, sir.

Q. Seven cars in the train for Memphis, Tennessee, one for Sardis, Miss., two for Jackson, Miss., one for Greenville, Miss.?

A. Yes, sir.

Q. On this turn-around run you speak of, did you or your crew tie up at Fulton, or always go back?

A. We went back to Paducah.

Q. Were some of the runs between the terminals direct runs so the terminal would be at each end of the line?

A. Yes, sir; out of Paducah we have runs that went through to Memphis and also to Jackson, Tennessee.

Q. And on those runs, when the crews make those runs, they tie up at the terminal?

A. Tie up at Memphis or Jackson.

Q. And after their usual rest they start out on another trip, is that right?

A. Yes, sir.

Q. Over what period of time had you been hauling coal
23 trains out of Paducah down to Fulton, similar to the one we have referred to on the 8th of December?

A. Well, the entire period of my work as conductor.

Q. As conductor of freight trains on the Illinois Central, what is the fact as to your being required in performance of your duty as conductor, to know the destination of every car in every train that you handled?

A. We have to know that.

Q. And do you know now and can you testify as to the fact as to whether or not you ever handled a train out of Paducah to Fulton, that did not have cars in, that were billed to points beyond Kentucky? Do you know about that so as to be able to tell us now?

A. Yes, sir.

Q. Now, what is the fact in regard to it?

Objected to as not the best evidence.

Objection overruled.

Exception by defendant.

A. We never handled a train out of Paducah to Fulton that there was not a portion of the train went to and beyond the state of Tennessee.

Q. Now I want to have you tell us about how the business was conducted at Fulton as to northbound trains. First, when you went on the turn-around run that you have spoken about, what is the fact as to your being required generally to couple into and take trains back with you to Paducah or to intermediate stations?

24 A. Well, we always took back a train or a portion of a train or a full train if there was that much there, and if not, whatever amount was there.

Q. And did it happepn at times that there was no train to take back or no cars?

A. Yes, sir.

Q. And what were you required to do when you had no cars to take back?

A. To go back with the caboose and engine.

Q. How frequently did it occur, to the best of your recollection, that you had no train for your engine to couple into and take back out of Fulton, north?

A. Well, there would be sometimes that, it would go for a week or possibly two weeks that we had a train of cars; maybe then there would be a day or two that there would be as many as two or three or four cars that we would pick up — the engine and caboose and come back to Paducah and lay there without any cars at all.

Q. What is the fact as to you, as conductor, having the same caboose while you were on this run, or not?

A. When we were assigned to a regular crew, we have also the assignment of a regular caboose.

Q. How often did you make trips when you were on this turn-around run in the usual course of the work as conductor?

A. Ordinarily, a trip every 24 hours. Sometimes it would be more—we would gain a day, and sometimes lose a day.

Q. But generally every day?

25 A. Yes, sir.

Q. When you would be running in charge of trains, going out of Paducah to Fulton, on these turn-around runs, what is the fact as to whether you always had the same engine, or whether engines interchanged?

A. The engines would change.

Q. And as to the caboose, what is the fact?

A. They did not change cabooses.

Q. What was the fact as to the situation at Fulton when you got down to Fulton and were ready to go back to Paducah on the turn-around as to whether you always took back the same engine, or a different engine?

A. Took the same engine and caboose back.

Q. The same caboose too?

A. Yes, sir.

Q. How about your crew?

A. Same crew.

Q. How is your compensation fixed—by the day or month, or by mileage?

A. Why, we are rated as per mileage.

Q. That is, you get your compensation by mileage?

A. Yes, sir.

Q. And how much was the mileage allowed you on this turn-around run?

A. The mileage allowed us on the turn-around run was 100 miles for the round trip.

Q. How was it made up—as separate items from Paducah to Fulton and then from Fulton back to Paducah, or was it one?

26 A. Why, our time slip was continuous.

Q. Was it the same as the time slips when you would run from one terminal to another?

A. No, sir.

Q. I mean, not in mileage, but you were paid in the same way?

A. It was the same blank, but of course it came in a little different form, a little different form of filling the blank, you know.

Q. What I mean by the same is, it would start out as from Paducah to Fulton and the same as if you were running from Paducah to Memphis?

A. The time-slip would give the leaving time of Paducah and the arriving time of Fulton, and then the leaving time of Fulton and also the arriving time and the leaving time at Paducah.

Q. Now, going back to Fulton, what kind of trains generally, if

you had any particular kind, did you take out of Fulton, north, to Paducah, during your four years' experience there on the turn-around run?

A. Well, it was sometimes the case that we would have solid trains, of empty gondolas, sometimes we would have a mixed train of empty coal cars and loaded cars of lumber; sometimes we would pick up a few cars of bananas and merchandise.

Q. You notice that my question was what was the general run of the cars—mostly.

A. The general run was empty coal cars.

Q. The same kind of cars you hauled down with loads?

27 A. Yes, sir.

Q. Then, in your experience, you would sometimes have loaded banana cars?

A. Yes, sir.

Q. Where would they come from?

A. They would come from New Orleans.

Q. Did you sometimes have lumber cars?

A. Yes, sir.

Q. Do you know where they came from?

Objected to as no foundation laid.

Objection overruled.

A. Yes, sir.

Q. In connection with that, I will ask you whether there were any saw mills or industries in Fulton cutting and preparing lumber—on the Kentucky side, were there any?

A. No, sir, I think not.

Q. Was there any industry in Fulton, on the Kentucky side, from which loaded lumber cars could come?

A. I don't think there was.

Q. Did you ever see one?

A. No, sir.

Q. Do you remember of any lumber yard in Fulton, on the Kentucky side?

A. No, sir, I do not.

Q. Do you remember one on the Tennessee side?

A. There is some lumber mills and stave mills on the Tennessee side.

Q. Now, what trains came into Fulton from the south during this time, in your experience down there—speaking generally?

28 A. Well, we had trains coming from Memphis, Tennessee; we handled empty coal cars, or any kind of freight, of course, that came in that way, from Memphis to Fulton, and then on the main line, we had trains coming from Jackson, Tennessee; we would frequently set out cars and occasionally set out entire trains at Fulton.

Q. Where would they put their trains, if there was any practice and custom generally there, in the yards at Fulton, when they came in from the south from Tennessee?

A. Why, the trains coming from Memphis, they stopped in Fulton for their rest, usually going to the New Yards.

Q. Stopped for their rest?

A. That was their terminal.

Q. Where would trains run coming in from Jackson and that section—that is, trains that were going on north?

A. The trains that came in from Jackson, Tennessee, if they were solid trains, for Paducah, and there happened not to be a Paducah crew there, took the train off the main line, ordinarily they would take them to the New Yard also.

Q. And was there any place down there at Fulton or any tracks where local cars would be placed for you gentlemen to take north in this turn-around run?

A. Why, yes, sir, we would pick up——

Q. I mean was there any particular track or tracks that they would put such cars on as distinguished from the New Yard,
29 or where they would put those trains that came in from the south.

A. Yes, sir, there was tracks that they put them on.

Q. What tracks were they?

A. Well, we had what was known as the elevator, and we had what was known as the C. & O. passing track, and the back track (just back of it) and also the house, Y and house track.

Q. And those tracks that you have designated, where are they located with reference to the Tennessee-Kentucky state line?

A. The house track, or house Y is wholly on the Tennessee side; the C. & O. passing track and back track, if I remember right, the south line crosses the C. & O. passing track at about the middle of the track; that is, divides it, and the back track is principally in the state of Tennessee.

Q. You spoke of an elevator track, didn't you?

A. The elevator track is crossed about middle ways by the state line.

Q. And what is the fact in regard to your picking cars up off of those tracks—this Y track and the back track and others—when you would be going back north?

A. Well, we often had to go to those tracks to pick up cars.

Q. How about going over across the Tennessee line as to whether you did that?

A. We frequently went into the state of Tennessee.

Q. But the main trains with the coal cars, you say, were
30 generally placed in the New Yard?

A. The New Yard, yes, sir.

Q. Where did you pick up this pile-driver outfit?

A. Picked it up at the New Yard.

Q. The pile driver was picked up on the Kentucky side. Do you know who the pile driver belonged to?

A. It had the initials of I. C. on.

Q. Illinois Central, did you say?

A. Yes, sir.

Q. I don't suppose you know just where the pile driver came from when it came into Fulton?

A. No, sir, I do not.

Q. Was there anything about its location in the New Yard that meant anything to you, as the business was conducted there and the placing of cars?

Objected to as calling for a conclusion and speculation.

Q. Was it the fact that stuff was placed in the New Yard that came from the north as well as the south?

A. Why, stuff coming from Cairo or Paducah, there, could be placed in the New Yard.

Q. What was the practice and custom, I mean such things, where you would have anything like a pile driver would it be taken into the New Yard as a custom and practice there, or taken somewhere else? If there was any custom, I don't know.

A. Well, if we had a train coming from Mound, Illinois,
31 they would come to the New Yard and there set out and turn around there and go back to Mound, the same as the Paducah turn around.

Q. Suppose there was any local thing like this pile driver being brought down over your line from Paducah or intermediate points, to leave at Fulton, was there any designated place along they would put such things?

A. We took it to the New Yard.

Q. So that doesn't mean anything?

A. No, sir.

Q. This pile driver outfit marked Illinois Central, or "I. C.," do you know what it was used for?

A. Used for keeping up the company's bridges and trestles, driving piling or posts.

Q. Now, about the engine that you said—367 I believe you said, didn't you?

A. Yes, sir.

Q. Was that a road engine, or a switch engine?

A. It was a road engine.

Q. Illinois Central?

A. Yes, sir.

Q. If you know, what was that being used for? Or had it been used for immediately before the 8th of December, up to that time?

A. Switching purposes in the Fulton yard.

Q. How long had you seen it around there and being used for switching purposes?

A. I don't remember just how long, quite a little length of time, though, it had been used there.

Q. Does that mean a week or a month?

A. It had been used there I think for months.

32 Q. Was it doing the regular work of a switch engine in the Fulton yards?

A. Yes, sir.

Q. Anything wrong with it at this time?
A. There was something that caused a great deal of steam to escape from the machine in some way, I don't know what it was.
Q. Did you know there at the time, what you were taking it back to Paducah for?
A. Yes, sir, I had a waybill of it.
Q. What was it going back for?
A. Billed to the Paducah shops.
Q. Where was it put in your train?
A. Next to my engine. We coupled into 367 with 876.
Q. 876 was your engine?
A. Yes, sir.
Q. And 367 was coupled to the rear of your engine?
A. Yes, sir.
Q. Then came the pile driver and outfit?
A. Yes, sir.
Q. The pile driver first?
A. Yes, sir.
Q. And then the outfit and then your caboose?
A. Yes, sir.
Q. And that made up your train when you left Fulton that afternoon?
A. Yes, sir.
Q. What time did you leave Fulton?
A. My recollection is now I left Fulton at 5.15 or 5.20, somewhere about there.

33 Q. Where was the pile driver and outfit billed?
A. Billed to Mayfield.
Q. That is, Kentucky?
A. Yes, sir.
Q. One of the stations?
A. Yes, sir.
Q. How far back from Fulton was Mayfield?
A. 22 miles.
Q. Did you have any occasion to stop after you left Fulton before you got to Mayfield?
A. Yes, sir, we stopped at Water Valley.
Q. For what?
A. We had to meet orders there, 155; I don't remember whether there was two or three sections.
Q. Well, at any rate, you had orders to meet a south-bound train there?
A. Yes, sir.
Q. So you had to stop there to let them pass?
A. Yes, sir.
Q. When you started out, or before you started out from Fulton, did you have orders as conductor?
A. Yes, sir.
Q. Are your orders lost—do you know where they are at all?
A. You mean my running orders?
Q. Yes, your running orders.

A. It is gone.

Mr. Hoke: Well here is a book that contains a copy of all the orders. I don't think there is any dispute about it.

Mr. Anderson: No.

Q. (Showing witness book.) Do you know what this book
34 is? You have seen it have you? Whose book is this?

Mr. Hoke: That is the despatcher's book. Whenever he sends an order he writes it in there. We understand that those are exact copies of the order.

Mr. Anderson: I will read it in by consent, the order he had when he left Futlon that afternoon. (Reading) "December 8, 1911, Order 87," what does "31 F & Y" mean?

Witness: That is first and second, number 180.

Q. What does 31 mean?

A. That is 31 Order. A 31 order is an order to be signed by the conductor.

Mr. Anderson (reading): Order number 87; 31 is the kind of order to be signed by the conductor and the order reads "F & Y first and second 180, engines 876 and 367 coupled and 1603 run as first and second number 180 Fulton to Paducah yard; first number 180 must not exceed a speed of 15 miles per hour." Signed by Peery and Gorman.

Q. Peery is yourself?

A. Yes, sir.

Q. Gorman was the conductor of second 180?

A. Yes, sir.

Q. Was that the orders you were running your train under as far as Mayfield?

A. Yes, sir.

Q. And when it is signed by Gorman does that mean second 180 had a duplicate copy of the same order?

35 A. Yes, sir.

Q. What is meant by a first 180 and a second 180?

A. That means that there is two trains running on the same schedule and they are designated as first and second—there could be several sections, as far as that is concerned.

Q. And the first runs ahead?

A. The first runs ahead.

Q. And the second follows?

A. Yes, sir.

Q. And so if there were three sections, the third would follow the second?

A. Yes, sir.

Q. Was there any time limit between the departure of one train and the other?

A. Why, there is a space of 10 minutes between the sections.

Q. You say you went out about 5:15?

A. 5:15 or 5:20, I don't just remember.

Q. Did you see anything of the second 180 after that?

A. After I left Fulton?
Q. Yes.
A. Yes, sir.
Q. Where?
A. Water Valley.
Q. Did it come into Water Valley while you were there?
A. Yes, sir.
Q. Do you remember about how long after you got into Water Valley it was when second 180 came in?
36 A. No, sir, I don't remember; it was something like an hour, possibly more than that.

Recess until 2:00 P. M.

Q. I think we were talking about Water Valley when we adjourned at noon, is that your recollection?
A. Yes, sir.
Q. And I will ask you how long altogether, as you remember it, you and your train were delayed at Water Valley?
A. Something like two hours.
Q. And was Robertson, the engineer, and his train, the second 180, at Water Valley also?
A. Yes, sir; not the entire time, but part of the time.
Q. I mean they came in there while you were there?
A. Yes, sir.
Q. And were they there when you left?
A. Yes, sir.
Q. Now, where was your next stop?
A. The next stop we made was at South Mayfield.
Q. And what did you do there?
A. Set out the pile driver, and outfit.
Q. And how long, all together were you delayed at Mayfield?
A. I suppose we were delayed something like 30 or 35 minutes, all told.
Q. And when you were ready to leave and left Mayfield, did you see anything of Robertson or his train?
37 A. Did not.
Q. You may state whether or not you received new orders at Mayfield?
A. Yes, sir.
Q. What was Robertson's engine number?
A. 1603.
Q. Do you happen to know the number of that order?
A. I think one of them was 108.
Q. Were there two orders at Mayfield.
A. Well, yes, sir, we got more than one order there; they might have been both in the same order, I don't remember.
Q. (Showing witness book.) I will just show you a book they have here where they copy the orders, and you look at 107 and 108.
A. This is where we had instructions to reverse positions.
Q. While you were at Mayfield, did you get an order from the

train despatcher or operator to change the positions of these two trains?

A. Yes, sir.

Q. And what became of that order?

A. That was superseded by another order.

Q. That is, before you left Mayfield?

A. Yes, sir.

Q. So that when you did leave Mayfield, you still went out as first 180?

A. Yes, sir.

Q. And Robertson's engine was still second 180?

A. Yes, sir.

38 Q. And that order is the one I showed you here, marked 108?

A. Yes, sir.

Mr. Anderson: That order reads as follows: "31 C & D first 180; orders 87 and 107 are annulled. Engine- 876 and 367 coupled display signals and run as first number 180 Mayfield to Paducah yard. (Signed) Peery."

Q. That is the substance of the order?

A. Yes, sir.

Q. Marked "8:40 p. m." You signed that order?

A. Yes.

Q. Now, I notice this order and the one referred to this forenoon, reads "C & E," what does that mean?

A. That means conductor and engineer.

Q. Then these orders are issued both to the conductor and engineer of a train?

A. Yes, sir.

Q. And if there are two engineers, each engineer gets an order?

A. Yes, sir.

Q. There were two engineers with this train?

A. Yes, sir.

Q. And is that the order that we have just read numbered 108, under which you were running from Mayfield up to the time of the accident?

A. No, sir—from Mayfield, yes, sir.

Q. From Mayfield up to the time of the accident?

A. Yes, sir.

39 Q. And your train then consisted of your engine and engine 367 and the caboose?

A. Yes, sir.

Q. Was engine 367 under steam?

A. Yes, sir, it had steam in it.

Q. Which engine was pulling the train?

A. Why, I don't know, the leading engine was the engine that was designated in the train, 367 had power enough to handle itself.

Q. But what I mean is, did engine 367 or the engine crew have anything to do with the train?

A. No, sir.

Q. Now, I notice this order is marked 8:40 p. m., what does that mean?

A. That means the time that I signed the order—well, rather the time that the despatcher gives "complete" on the train ordr; that is the time he gives "complete" on the train order.

Q. And when did you leave Mayfield?

A. We left Mayfield about 8:55 according to my recollection now.

Q. Now, after leaving Mayfield, where were you, and where did you remain?

A. I was in the body of the caboose on the left-hand side.

Q. And did you have any other stop after you left Mayfield before this accident occurred?

A. No, sir.

Q. Was your train at any time, after you left Mayfield, stopped or delayed in any way?

A. No, sir.

Q. To the best of your judgment and recollection, after
40 you got out of Mayfield, and got up your speed, at what speed did your train proceed along up to the time of the accident?

A. We were making at least twenty miles an hour or possibly 25.

Q. Did you pass through any stations, along the road before the accident?

A. Yes, sir, we passed two.

Q. What stations?

A. Hickory and Boaz.

Q. You may state whether or not in going through these stations you kept the speed up or slowed down?

A. No change made in the speed.

Q. What is the fact as to there being any operators on duty at Hickory or Boaz or both places at that time?

A. There wasn't any.

Q. What is the fact as to the operator being on duty at Mayfield?

A. There was an operator on duty there.

Q. Remained on all night?

A. Yes, sir.

Q. And it is the operators along the way that gives you these orders?

A. Yes, sir.

Q. Where—that is, between what stations—did the accident occur?

A. Between Boaz and Krebs.

Q. About how far out of Mayfield, as you remember it, was your train, or were you when the accident occurred?

41 A. About 15 miles.

Q. And what was the character of the track at the place where the accident occurred as to being curved or straight?

A. It was a straight track.

Q. And what about the grade, up hill, down hill or level?

A. Possibly the least up grade where the accident occurred, where I was picked up.

Q. When you say possibly the least up grade, do you mean a slight up grade.

A. Slightly up grade, yes, sir.

Q. You may state whether or not there was any curve in the track back or south of your train?

A. Yes, sir.

Q. From where the accident occurred?

A. There was a reverse curve south of where the accident occurred.

Q. How far, as near as you can remember it, and state it, were you north of the north end of that curve?

A. About 27 car lengths.

Q. And what do you mean by a car length, in feet?

A. Why, a car length they vary from about 36 to 40 feet.

Q. Were you still in the caboose?

A. Yes, sir.

Q. What were you doing before this accident and up to the time of the accident as you were running along there?

A. Why, at the time of the accident, I was making out
42 my—doing my clerical work for this trip.

Q. For what trip?

A. For the finishing up the delay reports for the entire round trip.

Q. When did you commence working upon your delay report for this round trip?

A. Just after passing through Boaz.

Q. And what is the delay report?

A. It is a report that the Company required us to make out giving the amount of delay in minutes or hours, also the cause of delay at any station or between stations.

Q. That covered your trip from Paducah back to Paducah?

A. Yes, sir.

Q. What object or thing were you working upon in connection with—a desk or anything like that?

A. Why, it was a table-like; that is, is was a table about two and one-half to three feet square, something near square, that we could put up against the wall and fasten it there and drop down with a stick underneath, and hold it for a table.

Q. Was that the table you worked at in making out your reports and things?

A. Yes, sir.

Q. Were you seated at the time?

A. I was sitting on the seat, the caboose seat.

Q. Was there anybody with you?

A. My rear brakeman was with me.

Q. What was his name?

A. Warford.

Q. Where was your other brakeman?

43 A. He was in the cupola of the caboose.

Q. What was his name?

A. His name was Williams, Essie Williams.

Q. Before I take up the collision, I want to ask you what lights, if any, on your caboose, were you required to have out and display?

A. They have two lights, one on either side of the caboose, showing red to the rear and green to either side and front. When you are on the main line, either running or standing.

Q. And were you on the main line?

A. Yes, sir.

Q. Were those lights out burning, and displayed?

A. Yes, sir.

Q. You speak of them being on the side of the caboose; where were they with reference to the rear—the corners, I suppose, of the caboose?

A. The lights on the sides are on the corners of the caboose, on either corner, and to the rear.

Q. You say they showed red to the rear?

A. To the rear.

Q. What other light or lights did you have displayed upon your caboose?

A. We had what was known as a revolving cupola lamp.

Q. Was that out and burning?

A. It was burning, yes.

Q. When I say out, I mean displayed?

A. Yes, sir.

Q. Were there any other lights, under the rules and regula-
44 tions, you were required to have on your caboose?

A. No, sir.

Q. Where were those lights put out and lit?

A. At Water Valley.

Q. And I take it that that is where it became dark?

A. Yes, sir.

Q. What sort of a night was this?

A. It was a clear night, starlight, dark.

Q. As you were seated there and as you have explained it, doing this work upon your delay reports, what happened? Tell it distinctly so we can hear?

A. Well, I was making out my reports, and there was a terrible crash came. The next I knew I was laying out on the ground on the right of way, some little articles of some kind, objects, laying across my lower limbs, and also my upper body was lying on some kind of timber.

Q. And what did you feel when the crash came? That is, after you were struck, tell the jury distinctly and in detail where you were struck and the first things you remember.

A. There was some great object struck me in the back, and right shoulder, and back of the head.

Q. Anywhere else?

A. And also there was something that seemed to strike me in the breast here; I don't know of course what it was.

Q. "In the breast here" (indicating) would be up under the collar?

45 A. Yes, sir.

Q. What was the first that you remember, now, when you were conscious?

A. The first thing that I remember, I realized that there had been a wreck of some description, and the thought struck me that section 180 would come along pretty soon, and it would all be piled up together; and then I made an effort to get up.

Mr. Hoke: I don't think it is competent for Mr. Peery to tell all about what he thought, and so forth, at the time, because we have testimony that is inconsistent with his story of it, and I therefore object to it as incompetent.

The Court: Oh, I think he can state if he remembers as it happened.

Q. Go on.

A. I tried to get up then, and to go back and flag second 180——

Mr. Hoke: I move to strike out "to go back and to flag second 180."

Mr. Anderson: I object to it being stricken out.

Mr. Hoke: On the ground that it is incompetent and immaterial.

The Court: Probably that is something simply in his mind. I suppose that is a good objection.

Mr. Anderson: You may strike out the last part, "to go back and flag 180."

Q. You started to get up. Tell us the result.

A. I couldn't get up. I made a second attempt to get up, and couldn't get up; I couldn't stand up and I dropped back and this elbow seemed to strike something.

46 Q. Which elbow?

A. The right elbow striking something throwed this collarbone up right here on the right side, it went above the front portion of the collar bone.

Q. Go on.

A. That made me very sick for an instant and I realized that that collar bone had to be placed back, and I reached over and got hold of this arm with the left arm and kept pulling the parts until they slipped back. Of course, that made me awful sick for the time being. Then the next I remember my rear brakeman calling—that is, called me by name. I couldn't answer him. I heard him, but I could not answer him. And a little later on, I don't know what length of time had passed, he called me again and I managed to answer him, the second time he called me. About the time that he got to me, the engineer that hit me came up with a torch.

Q. What was his name?

A. His name was Robertson. And I recognized Mr. Robertson when he brought the torch and shined it in my face, and I asked him what on earth had happened. And Mr. Robertson says, "Oh, I've hit you." And then they went to work and made arrangements by taking one of the seats in my caboose that had not been broke in two—which was a space of about six or seven feet across in length and lifted me on to that seat and shoved the seat through the gangway of the rear end with me on the seat.

Q. Rear end of what?
47 A. Shoved me through the gangway of the rear engine.
Q. Oh, the rear engine. What, if anything, while you were there at the place where they found you, did you see on the railroad track, opposite to you at that time?
A. I saw some empty coal cars alongside of me.
Q. Do you remember now how far they took you or anything about it, to get to what you call the rear engine?
A. No, sir; I do not.
Q. I take it you were taken to Paducah?
A. Yes, sir.
Q. And went to a hospital there.
A. Yes, sir, they took me to the Bethesda hospital.
Q. Now while you were there, being taken to the engine, and on the way, on the engine—I take it you rode on the engine to Paducah?
A. Yes, sir.
Q. Will you tell these gentlemen sitting here how you felt. If you had any pain or pains, locate the pains, and describe them.
A. Well, I was hit so bad through the back, shoulder, neck and breast that they had to run the engine just as slow as they could run it, as though it was not moving at all. I couldn't stand to have the engine go ahead and make any rate of speed—had to go very slow; and then it was very painful to me.
Q. That was your right shoulder?
48 A. The right shoulder, yes, sir.
Q. You remained in the hospital how long?
A. I was only there five days and nights.
Q. Were you discharged then, or did you leave on your own will?
A. I left on my own account.
Q. You lived in Paducah at that time?
—. ——.
Q. Did you go home?
A. Yes, sir.
Q. Who were the doctors that took care of you—your doctors at the hospital?
A. Dr. O. L. Taylor and Dr. Willett, I don't remember his initials.
Q. And who, if any one, treated you or took care of you at any time while you were at home?
A. They had Dr. Acree.
Q. Did you have any doctor after that that you went to downtown?
A. Well, later on, you may say in the latter part of the winter, I had Dr. Gilbert.
Q. An osteopath?
A. An osteopath, yes, sir.
Q. When was that, in the month of March, along in there?
A. I think so; I don't just remember now.
Q. When did you get up and around and be out of the house walking around?

A. I was some time in the latter part of January, or first of February before I could get out of the house.

Q. And what is the fact as to your suffering pain in your
49 shoulder and back and chest during that time?

A. I have suffered ever since the accident.

Q. Well, I know, but from that time?

A. Why, suffered awful bad for a long time, through the shoulder and neck and back.

Q. How long did Dr. Gilbert treat you? That is, how many treatments did he give you?

A. I don't remember now; I think it was about nine treatments, something like that.

Q. Who, if anyone, recommended you to Dr. Gilbert?

A. Dr. Kidd recommended me to Dr. Gilbert.

Q. Is that the same doctor that examined you with reference to the railroad conductor order insurance?

A. Yes, sir.

Q. This hospital referred to, is that the hospital where employees of the Illinois Central go?

A. Yes, sir.

Q. Is it something that you railroad men contribute monthly to?

A. Yes, sir.

Q. That gives you the right of treatment?

A. Yes, sir.

Q. Now what is the fact, Mr. Peery, with reference to your condition of health as to your back and neck and shoulder and breast, say, during the entire year of 1912? Meaning by that as to whether the pain ceased or not. Just tell us in your own way.

A. The pains never ceased. That is, most especially
50 through the back and right shoulder.

Q. Well now, locate the pains that you had in your back.

A. The pains start and run in the middle of the back between the shoulders and sometimes it runs into the back of the head, and other times it goes down the other way, and off into the right hip.

Q. Do you have any pain in your back now?

A. Yes, sir.

Q. Coming and going or a steady pain?

A. Well, I have steady and uneasy feeling in the back and right shoulder and neck.

Q. Have you any pain now in your chest?

A. If I cough or sneeze, my breast hurts, causes pain there.

Q. Well, we will take it now. With reference to your right arm and shoulder, have you any pain there? I mean as you sit now, quietly, do you have any pain there or sensation?

A. Well, there is more or less pain—uneasy feeling; there is no severe pain in my shoulder.

Q. To what extent can you raise your right arm out straight from your body as I am raising mine?

A. I cannot raise it very far, I can't raise it straight.

Q. I wish you would raise it, Robert, and put it out as far as you can, without reference to whether it hurts you or not; never

mind about the pain. Put your arm out just as far as you possibly can, never mind the pain, bring it up, even if it hurts.

51 A. I can't; it won't come any farther than that; I can't raise it any farther. (Witness indicates.)

Q. That is not to exceed 45 degrees. Now just stand up, Robert; now bring your right hand right forward and now bring it up to your face and your head as far as you can.

A. I can't bring it up. That is as far as it will come.

Q. With your hands up to your forehead and the side of your head. Can you work your hand up by working it along your face?

A. I can't pull it up.

Q. Can you put your hand on top of your head?

A. No, sir.

Q. Is there any position that you can put your right arm in where you can put your hand up on top of your head?

A. No, sir, unless I raise it with the other.

Q. I mean without help?

A. No, sir; no, sir.

Q. Now, take hold of your elbow with your left hand and force that arm up so as to get the palm of your hand on the top of your head. Try it and try your best.

A. I don't know whether I could do that or not. (Witness indicates.)

Mr. Anderson: Witness puts it up so the fingers reached the center of the top of his head.

Q. Does that hurt you?

A. Yes, sir.

Q. Where does it hurt you?

52 A. It hurts right through that shoulder joint, more especially in the back part. (Witness indicates by putting his fingers against the outer edge of the shoulder, a little back.)

Q. Now, can you put your hand behind you?

A. It will go around behind me tolerably well.

Q. You don't have so much trouble with it in reaching behind you?

A. No, sir.

Q. How long, as near as you can tell, has the shoulder and arm been in the condition it is now in?

A. It has been ever since the wreck.

Q. Well, what improvement if any—have you been able to observe—in your ability to move your arm out from your body or raise your arm up so as to put your hand up on your head? What change in the way of improvement has occurred?

A. Well, practically none.

Q. Do you remember the case being tried a year ago January?

A. Yes, sir.

Q. Can you do any better now than you could then?

A. I don't see any difference.

Q. Was there anything wrong with your arm or shoulder before this accident occurred?

A. No, sir.

Q. Are you right handed?

A. Yes, sir.

Q. Now, with reference to your collar bone, so far as you know, that has healed?

A. Yes, sir.

53 Q. And as I understand, with your chest, you only suffer any pain there when you cough, or sneeze, or some exertion like that?

A. Yes, sir.

Q. Robert, as you sit there—sitting as erect as you can—can you put your head voluntarily forward so that your chin will come down against your chest?

A. I don't know whether I could or not.

Q. Try it and try your best, put it as far as you can.

(Witness indicates.)

Q. As you are doing that, how does it feel about your neck and back?

A. Why, it hurts, seems like where the neck comes away from the shoulder, and also right in the upper part of the neck.

Q. What is the character of the pain, the sensation that you feel?

A. Well, it seems like there is something there that is too short, that won't permit the head to come down.

Q. Is your back crooked or straight now?

A. Well, it seems to be considerably crooked to me.

Q. How were you before this accident as to being stoop shouldered or erect?

A. I were erect.

Q. Did you ever have any injury to your back of any character before this accident?

A. No, sir.

Q. Any improvement in your back since the last trial?

54 A. No, sir.

Q. Robert, can you stand with your back against the wall and put your head against the wall?

A. No, sir.

Q. Do you know how near you can get it to the wall by your utmost effort?

A. I do not.

Mr. Anderson: With the Court's permission, I would like to have him do his best.

The Court: I don't think there is any objection is there?

Q. This seems to be the most convenient wall, Robert, if you will stand here. (Indicating the wall at the end of where the jury are sitting.) With your heels against the mop board, and your back

against the building, now will you put your head back just as far as you can put it—use your utmost effort.

A. That would be as far as I can go. (Indicating.)

Mr. Anderson: It comes within about four inches, would you say? Of the wall. (No response by Mr. Hoke.)

Q. Mr. Peery I wish that you would sit up in your chair and throw your head back, putting your back against the seat that you are in,—perhaps you had better move your chair a little forward, or you will hit that thing there—now sit up straight in your chair, as I am sitting and throw your head backward as far as you can throw it, use your utmost effort without regard to pain.

55 Witness indicates.

Mr. Anderson: I should judge that he can throw it back only a slight degree beyond a perpendicular.

Mr. Hoke: Well, now, I don't know.

Mr. Anderson: I want you to see and get it as near as you can, because it ought to appear in the record.

Q. Put it back as far as you can—let it hurt.

(Witness indicates.)

Mr. Anderson: Somewhat back of the perpendicular.

Q. Does that hurt you?

A. Yes, sir.

Q. Do you have any trouble in turning your head to the right or left?

A. It doesn't seem to turn as far as it used to or ought to turn now.

Q. Is there any difference in the direction you turn it—as to your ability.

A. I believe I can turn a little farther to the left than I can to the right.

Q. Does it hurt you to turn your neck?

A. Yes, sir, that is, to turn my head very far.

Q. Now, Robert, when you are standing up, to what extent can you stoop over, keeping the legs stiff and not bending them, stoop down the way you did before you were hurt?

A. I can't bend down like I could before.

Q. Show us the best you can do, do your best in all these things, Robert. (Witness indicates.)

56 Q. Do the very best you can and reach to the floor with your hands.

A. I can't reach to the floor.

Q. I know you can't, neither can I, but do the best you can.

Witness illustrates.

Mr. Anderson: Indicating probably about 15 degrees of a stoop-over?

Mr. Hoke: Oh, I guess so.

Mr. Anderson: It is hard to say.

Q. What was your height before this accident occurred, in your stocking feet or bare feet?

A. Five feet, eight and one-half inches.

Q. On what occasion or occasions as you remember, did you have your measure taken?

A. As I remember, occasions when I were growing up, after I were about grown, by measuring my height, and also the height was taken when I went to work for the Illinois Central Railroad Company.

Q. Was that a part of the medical examination—the measurement of your height?

A. Yes, sir, I think so.

Q. And were you measured then with your shoes on or off.

A. Shoes off.

Q. And do you remember the exact height?

A. Five feet, eight and one-half inches.

Q. Were you measured yesterday on a measuring machine in Dr. Ball's office?

A. Yes, sir.

Q. In your stocking feet?

57 A. Yes, sir.

Q. Was it a measuring rod that came up with a right angle thing coming out?

A. Yes, sir.

Q. Came down to your head?

A. Yes, sir.

Q. Did you see the height and the measurement after it was placed on top of your head?

A. Yes, sir.

Q. What was it?

A. Five feet, six and one-quarter inches.

Q. Did you attempt to do any work in the year 1912 before we tried the case a year ago in January?

A. No, sir.

Q. Were you able to do any manual labor?

A. No, sir.

Q. Do you remember what your normal weight was before this accident occurred?

A. I ran from about 205 to 211.

Q. As you coughed, then, did that hurt your chest?

A. Yes, sir.

Q. Do you remember what your weight was at the time of the trial, a year ago in January?

A. No, sir, I do not; somewhere about 165 I think it was.

Q. Well, you remember approximately, then?

A. Yes, sir.

Q. Were you weighed yesterday at my request?

A. Yes, sir.

Q. What did you weigh*t*?

58 A. 192.

Q. Have you done some work during the year 1913?

A. Yes, sir.
Q. Do you remember what time you went back to Paducah, 1913, after your trial here?
A. I think I left here on the 23rd day of January.
Q. What was the first work that you did after you got back to Paducah?
A. I started up a little feed-store.
Q. Your own?
A. Yes, sir.
Q. In Paducah, Kentucky?
A. Yes, sir.
Q. And what class of feed did you handle?
A. Handled hay, corn, oats and bran.
Q. Baled hay?
A. Yes, sir.
Q. Anybody in the store with you and helping you?
A. Yes, sir, my boy was with me.
Q. Athol?
A. Yes, sir.
Q. He is the young lad that is here?
A. Yes, sir.
Q. When did you start in your business in the feed store?
A. My recollection is now it was about the 17th day of April.
Q. Was that about as soon as you could get around after the floods?
59 A. Yes, sir.
Q. How long did you continue in that business?
A. Until about the first of October.
Q. Did you and your boy do the work in there?
A. Yes, sir.
Q. Did you there, during that spring, summer and fall, handle the sacks of grain and baled hay or help handle them from time to time?
A. Sometimes I had to handle them the best I could by myself, when the boy happened to be out on delivery.
Q. So as to help in the work?
A. Yes, sir.
Q. And did you get the income from the business yourself?
A. Yes, sir.
Q. What you made out of it?
A. Yes, sir.
Q. And what was your average income from the business while you were in that business?
A. It never run over thirty dollars a month.
Q. Do you mean by that gross or net?
A. The net income.
Q. Then did you quit the business?
A. Yes, sir.
Q. In October?
A. Yes, sir.
Q. While you were there doing this work and when you were handling the objects such as sacks of grain and baled hay, or attempting to handle it, will you tell this jury, as accurately and correctly

as you can, just how it affected you, and how you got along?
60 Tell them in your own way.

A. Why, in handling those bales of hay, or bags of bran, or corn, or oats, of course it hurt very bad to handle it, it hurt my back and shoulder and neck, I couldn't lift them up—that is, like a man would ordinarily—I would have to work them along on the floor to get them to the edge of the porch to put them in the wagon, or else sometimes I would drag the sacks along, I couldn't pick them up, they were too heavy.

Q. By the way, how much would a sack of oats that you had there, the kind you handle weigh?

A. I think some sacks of oats had five bushels to the sack.

Q. That would be about 160 pounds?

A. Yes, sir.

Q. How did you get along with one of those?

A. I couldn't handle it by myself at all—that is, load it.

Q. How about your ability to handle a 160-pound sack before the accident?

A. I could handle it very nicely.

Q. How was your physical strength before this accident, were you a strong man, or a medium strong or how?

A. I guess I was an average, if not above the average.

Q. Before the accident how were you as to getting around, whether you were slow on your feet or quick and active?

A. I was tolerably quick.

Q. What have you been doing since you quit the feed business?

61 A. There was from the first of October, until along about the first of January that I was not doing anything. From the first of January, 1914, it is a place of business where I were at, started up, and being run by a man by the name of Joe Wallace and James R. Moore, I took the position there to answer telephone and to take orders.

Q. And what salary do you get for that?

A. I get three dollars a week.

Q. Anything else you have done since you were hurt, where you can earn money?

A. No, sir.

Q. Do you feel able, or have you, at any time, since the accident, felt physically able to engage in the work that a freight conductor does and has to do?

A. No, sir.

Q. Does a freight conductor climb up and down cars and run around their trains?

A. Yes, sir.

Q. Are you able to climb up a box car with your right arm in the shape it is in?

A. I suppose I could climb the car, but then it would be a difficult matter.

Q. Now, aside from the arm or shoulder and back—how is your general physical strength—how do you feel and how have you felt?

A. I don't feel stout; I feel stooped—I don't feel stout like I used to feel.

Q. Do you feel as though you have got the physical strength you had?

A. No, sir.

62 Q. Is there just a slight difference, or is it marked in your feeling?

A. There is a big difference.

Q. Before you were hurt, years before that, when you had leisure, were you a hunter, handling guns?

A. Yes, sir, I liked my gun.

Q. That is where you used to have your fun?

A. Yes, sir.

Q. Have you tried shooting a shot gun since you were hurt?

A. Yes, sir.

Q. How many times?

A. I don't think I tried it but once or twice.

Q. What effect did it have upon you?

A. I can't stand the jar of the shot gun.

Q. How does it affect you, the jar, or firing?

A. It seems like every joint in my back bone slips. It makes me sick—it hurts.

Q. Now, with a rifle, when you shoot with a rifle, I suppose you use the sights?

A. Yes, sir.

Q. Have you tried a rifle?

A. Yes, sir.

Q. And when you were in your normal condition before the accident, where did you put the stock of the gun in firing?

A. I placed the stock proper against the shoulder when I were well.

Q. With the prong above and below?

A. Above and below.

63 Q. And where were you able to get the gun so as to sight it since you have been hurt?

A. Well, I have to put the lower point of the stock against the middle of the shoulder.

Q. And the upper point above?

A. The upper point above.

Q. Why?

A. In order to get the gun high enough that I can get my head down to see the sights.

Q. When you were here in St. Paul for the trial a year ago in January, several of the doctors examined you, did they not?

A. Yes, sir.

Q. Dr. Ball, and Dr. Davis?

A. Yes, sir.

Q. For yourself, at my request?

A. Yes, sir.

Q. And Drs. Sneve and Daugherty and McLaren for the defendant?

A. Yes, sir.

Q. Dr. Ball saw you several times?
A. Yes, sir.
Q. Before the last trial, I mean.
A. Yes, sir.
Q. And Dr. Davis, I believe, two or three times.
A. I believe so.
Q. And those gentlemen have examined you since you came back this time for this trial; Dr. Ball and Dr. Davis?
A. Yes, sir.
Q. And Dr. Sneve and Dr. Daugherty have examined you for the defense?
A. Yes, sir.

64 Cross-examination.

By Mr. Hoke:

Q. You took this coal train south from Paducah to Fulton?
A. Yes, sir.
Q. On this particular day in question?
A. Yes, sir.
Q. And this was the turn-around run?
A. Yes, sir.
Q. So that ordinarily, and in fact regularly, you took a train to Fulton and then turned around and came back to Paducah on the same day or as part of the same trip?
A. Yes, sir.
Q. Frequently, on your way back from Fulton to Paducah you took cars, with you?
A. Yes, sir.
Q. Sometimes, if there were no cars, you ran back light?
A. Yes, sir.
Q. But I got the impression from your testimony that ordinarily there were some cars to go back that way?
A. Yes, sir.
Q. You didn't do any work between Fulton and Paducah, such as is done by a local freight, for instance?
A. Sometimes we would set out cars, way cars, and sometimes pick up cars at Mayfield for the south or Mayfield for the north in coming back to Paducah.

65 Q. Well, then, sometimes in going back from Fulton to Paducah, you would handle cars locally between stations there?
A. We would sometimes have cars to set out, yes.
Q. Sometimes have a car to set out at Mayfield, sometimes you would have a car to pick up at Mayfield, and take to Paducah?
A. Yes, sir.
Q. And a place called Clay Switch, was that a place where you sometimes set out or picked up cars?
A. Not very often. Well, in fact, I don't think that I ever picked up a car at Clay Switch except when on our local freight.
Q. On local freight?
A. Yes.

Q. Can you recall having set out any cars at Clay Switch?
A. Yes, sir, we would sometimes shove empty box cars to be loaded with clay in on the spur.
Q. And where was Clay Switch with reference to Mayfield—which direction was it from Mayfield?
A. South of Mayfield, or rather southwest.
Q. Between Mayfield and Fulton?
A. Yes, sir.
Q. On this particular day, having come to Fulton with this coal train, that afternoon, you prepared to go back to Paducah, and you learned that this engine 367 was to go back to Paducah to the Paducah shops, is that right?

66 A. Yes, sir.
Q. And also that this pile driver outfit was to go to Mayfield.
A. Well, I didn't know at that time where it went; of course I knew where I picked it up.
Q. You knew you were to take it?
A. I knew that I were to take it, yes.
Q. And later on you ascertained that it went to Mayfield?
A. Yes, sir.
Q. Did you get any sort of billing for this pile driver from Fulton to Mayfield?
A. Yes, sir.
Q. Not an ordinary way bill?
A. No, it was what we call a company's slip bill, I believe, or a bill that is used by the company for shipping their company's material over the road.
Q. Just a sort of slip or memorandum to the conductor showing where to leave the particular cars?
A. Yes, sir.
Q. And did you get that sort of a slip covering engine 367?
A. Yes, sir.
Q. You are quite sure about that? Are you?
A. Yes, sir.
Q. Notwithstanding the fact that this engine, 367, was really working under steam and had an engineer or fireman on it?
A. I had a company way bill with the engine 367.

67 Q. Now, did you ever hear of any company slip, as you call it, or way bill, having been issued before, when an additional engine was accompanying the train under steam, and with the engineer and the fireman on it? In other words, was this not a very extraordinary thing that you should under those circumstances, have received a way bill or slip for that engine?
A. Why, I don't know that it was anything out of the ordinary about it.
Q. Well, can you remember——
A. But I don't remember that I ever had an engine with a slip bill before where there were two men accompanying the engine.
Q. No, if there was just one man going with the engine to watch

it, why then, of course, the situation would be different, isn't that right?

A. Well, they invariably, when there is a man accompanying the engine, there is invariably a way bill with the engine.

Q. This engine, 367, was coupled up and working steam, wasn't it?

A. Why, I suppose so.

Q. In other words, 876 was not pulling 367 to Paducah?

A. Why, I suppose, if 367 was able to handle itself, it would not be necessary.

Q. Yes, in other words, you might as well say that 367 was shoving the other engine, as to say that the other engine was pulling 367; isn't that right?

A. Why, 367 was able to handle its own weight.

68 Q. Yes, so you practically had a train that was a double-header, wasn't that it?

A. Well, in a sense, yes sir.

Q. Sometimes did you have trains so long that you had to run double-headers on the division?

A. No, sir, not that I remember.

Q. The use of double-headers was rather uncommon was it?

A. No, sir.

Q. Well, then, you did sometimes have double-headers?

A. I can't call to mind now of any time that I ever had a double header.

—. That is, on account of tonnage, but——

A. Or quantity of cars, either.

Q. Would it not happen, however, that sometimes you would double-head back so that you would just be running one train instead of running two, and one conductor instead of two conductors?

A. Why, that I can't call to mind now, any occurrence that I had like that, but then it could be done.

Q. I wondered if you could recall that that had been done?

A. I don't recall now any time that I ever made a trip like that.

Q. Well, did you observe that others did that sometimes?

A. I could see that there was times that there was two engines and two cabooses, and they were all coupled together.

69 Q. Yes, and that is what you call double-heading back, isn't it?

A. Yes, I suppose so.

Q. And that was not because the engines were disabled at all?

A. No, sir.

Q. Do you happen to know what was wrong with 367?

A. No, sir, I do not.

Q. When you switched out the pile driver at Mayfield, did 367 do the switching for you?

A. No, sir, we used the two engines together.

Q. Used the two engines together?

A. Yes, sir.

Q. What time did you leave Fulton?

A. About 5:15 or 5:20, somewhere along there, I don't just remember.

Q. And then you went directly to Water Valley?

A. Yes, sir.

Q. How far from Fulton is Water Valley, if you know?

A. Something like five miles.

Q. And what did you do at Water Valley?

A. Ran inside there to meet, it seems to me now, first, second and third, of number 155.

Q. What kind of train was 155?

A. Why, 155 we know them as manifest trains, sometimes it is the case that they will run a train of coal as third main, and sometimes they will fill out the two first mains, with coal, if they have not a full train of manifest stuff.

70 Q. At any rate, when you got to Water Valley you headed in on the so-called passing-track and waited there to allow certain trains, that you think you recall to have been first, second and third 155 to pass you?

A. Yes, sir.

Q. And how soon after you had arrived at Water Valley did the second section of your train, upon which Mr. Robertson was the engineer, arrive at Water Valley?

A. Why, it was more than an hour, as I recollect it now, from the time I arrived, until he arrived.

Q. Why were you waiting all this time at Water Valley?

A. I didn't have time to leave Water Valley, after the 55 until I was stuck for 121. I didn't have time to make Wingo for number 121.

Q. What kind of a train was that?

A. A local passenger train.

Q. Now, while you were standing on the passing track at Water Valley, and while first, second and third 155 were passing you, south, was second 180 (that is to say, Robertson's train) back of you on the passing-track there, or had it not yet arrived?

A. They had not arrived.

Q. They didn't arrive then, until after the 155 had passed?

A. No, sir.

Q. Well, then, in other words, they didn't leave Fulton until 155 had gotten to Fulton?

71 A. No, sir.

Q. And then it came up there and headed in on the same passing-track that you were standing on at Water Valley?

A. Yes, sir.

Q. Then you both waited there for this passenger train?

A. Why, we both waited at Water Valley until No. 101 passed.

Q. As soon as 101, this passenger train, passed you at Water Valley, then you started on north?

A. Yes, sir.

Q. What time was that?

A. I don't just remember what time I left Water Valley, some-

thing past 7:00 o'clock; I suppose it is possible it was 7:25 or 7:30, somewhere along there, I don't know just what.

Q. How do you figure that out?

A. From the time that number 101 was due there.

Q. I see; you know that 101 was due to get by Water Valley at 7:19, and assuming that they were on time, you are sort of figuring that you left a few minutes afterwards?

A. I think they were a little late, I don't remember how much.

Q. You don't remember about that?

A. No.

Q. But that is substantially the time that you left there?

A. Yes, something after, or about.

Q. About half past seven?

72 A. About half past seven somewhere.

Q. And at that time your lights were lighted?

A. They were lighted when I left Water Valley, yes, sir.

Q. And you had been laying there at Water Valley a couple of hours?

A. Yes, sir, something like that.

Q. What were you doing in the caboose while you were laying at Water Valley?

A. Why, I don't remember whether I were in the caboose at Water Valley from the time we arrived there until we left there.

Q. Where were you?

A. At the telegraph office.

Q. What were you doing at the telegraph office?

A. Well, I was there so in case that there was any orders for me, I could get them, be at the office so the dispatcher could get hold of me.

Q. Was the passing track near the telegraph office?

A. Just the main line between the passing track and the office.

Q. So that your caboose was standing right opposite the telegraph office?

A. I don't just remember now.

Q. Well right near by?

A. My recollection is that I stopped the train, the caboose, just north of the street crossing by the depot.

Q. Then your caboose was sufficiently near the telegraph

73 office so that you could get orders all right if you had been in the caboose?

A. I don't remember just where the caboose was standing, somewhere about the office ordinarily—well immediately I went when I arrived at the station that way, to the telegraph office, so if the dispatcher wanted me for an order or anything, I would be there.

Q. When you got there did you know that you were going to wait a long time?

A. Why, no, sir, I didn't know but what I would get away between the time of number 121 and number 101.

Q. What was 121?

A. No. 121 was a local passenger train, going south.

Q. And 101 was what?

A. Was a through passenger train.
Q. Oh, there were two passenger trains went by you there?
A. There was three.
Q. What was the other one?
A. The other one was known as number 38, north bound, that is, going from Fulton to Paducah.
Q. So that while you stood there at Water Valley, three freight trains passed you going south, two passenger trains going south, and one passenger train going north?
A. Yes, sir, I think that is correct.
Q. And you don't know whether you were in your caboose while you were there at Water Valley or not?

74 A. I don't think I was.

Q. Now, weren't you and Warford playing Pitch in the caboose there, and didn't you invite Robertson to come in and join with you?
A. Not that I remember of.
Q. You have no recollection about that?
A. No, sir.
Q. Now, if Mr. Robertson says that that is the way it was, would you dispute the correctness of his statement, or would you simply take the position that you didn't remember about it?
A. I don't think that that is the fact.
Q. You are familiar with the game of Pitch?
A. Why, I suppose, yes, sir.
Q. Well, you suppose so—don't you know exactly what the game is?
A. Well, there might be different ways of playing Pitch, I don't know; there might be several different ways.
Q. I know, but have you ever played it in any way at all?
A. Yes, sir.
Q. Are you a pretty good player?
A. I don't know; not very good I guess.
Q. Is that a popular game among the railroad men, or do you play "Smear" or "Euchre," or what is the popular game?
A. I don't know, I never have been around boarding places with railroad men a great deal; don't know whether they play it around those places at all or not.

Q. I am thinking particularly of any game that the men
75 can play in the caboose when they are tied up a long time; I am not suggesting playing for any money or anything—just a little pastime. Now, did you play Pitch in your caboose?
A. No, sir.
Q. You and Warford?
A. No, sir.
Q. Then you didn't invite Mr. Robertson to come in there and play?
A. No, sir.
Q. While you were at Water Valley?
A. No, sir.

Q. And did you play any kind of cards in the caboose—just to pass the time away?

A. No, sir.

Q. Never.

A. No, sir.

Q. Why didn't you make out your reports at Water Valley?

A. Because the trip was not completed.

Q. Well, the trip was not completed at Boaz, was it?

A. No, sir, but I could complete my reports from Boaz into Paducah, and have them complete on my arrival at Paducah so I could turn them in.

Q. Then you wouldn't make them out partially, you wouldn't make them out as you went along?

A. Oh no, nothing except the wheel report and switch list—the wheel report of course going south and also the switch list had to be left at Fulton with the way-bills so that the switch list was to be used by the switchmen in breaking up the train.

76 Q. But when you finally got to the end of your trip, it was necessary for you to make out some report, covering the whole trip, and you ordinarily did not start to make that out until you got near home—was that it?

A. Yes, sir.

Q. You didn't make it out piece-meal?

A. No, sir, not——

Q. Was that a long job?

A. Why sometimes it is a tolerably long job, from the mere fact that we would have considerable delay, and delays at different points.

Q. But what would you do—carry this all in your head up to the end of the day and then put it down?

A. Why, certainly.

Q. For instance, if you were delayed ten minutes at one station, and fifteen minutes at another station and two hours some place else, you wouldn't put it down at the time——

A. Not necessarily, no, sir.

Q. Now, leaving Water Valley, Robertson's train was right behind you?

A. Tolerably close, yes, sir.

Q. Do you remember seeing his headlight burning there at that time?

A. No, sir, I don't know that I do.

Q. You don't remember?

A. No, sir, I don't.

Q. Your lights were lighted at that time?

A. Yes, sir.

77 Q. And then you just went right on up to Mayfield?

A. Yes, sir.

Q. Going at about what rate of speed?

A. Well, we were going at something like 15 miles an hour.

Q. Something like 15 miles an hour?

A. Yes, sir.

Q. How far from Water Valley to Mayfield?

A. About 17 miles.

Q. Arriving at Mayfield, you proceeded to set out this pile-driver?

A. Yes, sir.

Q. Why had you not been running any faster than 15 miles an hour?

A. I had a train order restricting my speed to 15 miles an hour or not to exceed that.

Q. I suppose you understood that was because this pile driver was kind of a top-heavy machine, and it was not safe to run any faster than that with a pile driver?

A. No, sir, I didn't understand it that way.

Q. What was the reason for restricting the speed?

A. It was on account of 876 being a new engine out of the bake-shop and the 367 being a crippled engine, going to the shops.

Q. How long had 876 been a new engine?

A. This was her first trip.

Q. You don't know whether 376 was crippled in any way that Made any difference about the speed with which it ran, do you?

78 A. You mean the 367?

Q. 367.

A. No, sir, I don't know anything about it.

Q. Well, then, that is your guess about it?

A. What do you say?

Q. I say you guessed that there may have been something wrong with 367 that made it necessary to limit the speed to 15 miles an hour.

A. I only have the engineer's word for that.

Q. Well, when you got to Mayfield, wasn't something said about your being able to make ordinary speed?

A. No, sir.

Q. Well, how does it happen that you increased your speed then?

A. From the fact that my engineer told the operator to tell the dispatcher that he could beat 15 miles an hour, possibly make 20 miles an hour.

Q. Now, Mr. Peery, don't you really know that the reason that the speed was restricted on that train was because the pile-driver was a top heavy apparatus and could not be safely run at the high speed?

A. No, sir.

Q. It could not have had anything to do with it?

A. The pile-driver?

A. Yes.

A. No, sir.

Q. You think yourself that that pile-driver could safely have been run at a much higher speed than 15 miles an hour?

79 A. It could have been run at a reasonable rate of speed.

Q. When you had gotten to Mayfield and set out the pile-driver, then you got this second order, did you—108?

A. I don't know whether it was the second order, I got a couple of orders at Mayfield.

Q. Well, 108?

A. 107 and 108, I think, is the number of the orders, I got at Mayfield.

Q. You got 107, and order 107 said "Engine 1603, then 876 and 367 coupled, reverse positions as first and second number 108 from Hickory to Paducah yard." You got that first, did you, at Mayfield? In other words, you were told that in the beginning you and Robertson, or you and Gorman, should reverse when you got to Hickory so as to let——

A. My recollection is we were to reverse positions at Mayfield.

Q. This says reverse at Hickory. And where is that with reference to Mayfield?

A. It is the first station north of Mayfield.

Q. Only a few miles?

A. About five or six miles, I suppose.

Q. Anyhow, the proposition was that you were to reverse?

A. Yes, sir.

Q. That is, you were to get in behind them?

A. Yes, sir.

Q. Then, did you object to that? Or did the engineer object in your presence?

80 A. There was no objection except that I told the operator that I had not seen or heard of the second 180 since I left Water Valley.

Q. Yes?

A. And the operator then told the dispatcher and the dispatcher had the operator step to the door and see if he could see or hear of section 180, and the operator reported that he couldn't see nor hear section 180 and annulled all orders ahead and gave me an order out of Mayfield to display signals, and run as first 180.

Q. Well, I know, but you are leaving out something, you are leaving out the question of your speed; he annulled not only this reverse order, but he also annulled the original order limiting you to 15 miles an hour; now what lead up to this annulling the original order 87, which limited you to 15 miles an hour?

A. I don't just understand the question.

Q. Well, I say now, first of all, he made an order reversing the positions, of your sections.

A. Yes, sir.

Q. And then you said, "Well, I have not seen second 180 since we left Water Valley," then you say that the operator (Murphy) at Mayfield, stepped out and tried to see if he could see second 180 and he could not, and then he went back, and then the dispatcher said, "Well, all right, you can go ahead, continue to be first 180." But he did more than that, he also annulled this original order limiting your speed to 15 miles an hour; and now I say, do you know what led up to his taking the speed limit off of your train?

81 A. The 15 miles an hour order?

Q. Yes.

A. Because my engineer told him he could make more than 15 miles an hour.

Q. Well, he didn't put any speed limit on you at all?

A. No, sir.

Q. In other words, after you had delivered the pile-driver there, there was no speed limit on you any more?

A. No, sir.

Q. And did you yourself, request that you be allowed to go on as first 180? You naturally would prefer to get into Paducah first.

A. I don't think I said anything, any more than that I had not seen section 180.

Q. You think that is as much as you said about it?

A. That is as much as I said about it.

Q. Well, anyhow, you had this order telling you to go right ahead to Paducah, and you started out?

A. Yes, sir.

Q. And at that time you had this first engine and second engine and a caboose?

A. Yes, sir.

Q. And at that time also you didn't know where the second 180 was?

A. No, sir, I didn't.

Q. Now, what was your speed leaving Mayfield and for several miles north?

A. Why, I suppose we made from 20 to 25 miles an hour.

82 Q. That was a perfectly safe speed there, was it?

A. Yes, sir.

Q. And did you notice whether you maintained that speed pretty well?

A. I couldn't tell any difference, any change one way or the other in the speed.

Q. And was it at Mayfield that you started to make up your reports?

A. No, sir.

Q. You started to make them out at Boaz?

A. After I passed Boaz.

Q. Why did you wait until then?

A. Because it takes me that length of time to finish up my report to the time I arrived at the Paducah yard.

Q. Well, what is the object—do you want to be very careful not to get through before you get there?

A. Why, you can't get through when you get there, because you haven't completed the trip. These reports contain your arriving time, also the time that you are relieved. That is, I mean the time that you arrive at the yard office.

Q. Mr. Perry, you were of course familiar with the rules of the company?

A. Yes, sir.

Q. And those rules are to some extent embodied in the so-called book of rules?

(No audible answer.)

Mr. Hoke: This is the book (showing book) apparently
83 that you did not use when you tried this case the last time.
Mr. Anderson: I presume so.

Q. Now, you, as conductor of the first section of 180—that is to say, of your train—were in charge of the movements of that train, were you not?

A. Yes, sir.

Q. You were also responsible for protecting the train from collisions, from the rear, were you not?

A. Yes, sir.

Q. If for any occasion or circumstances arising rendering it likely, or, to your mind possible that some train might run into you from the rear, it was your duty to see to it that the rear of your train was protected?

A. Yes, sir.

Q. If your train stopped, I suppose you would send out your flagman?

A. Yes, sir.

Q. And it was also your duty to have in mind trains that might be approaching from the rear with a view to guard against possibility of a rear end collision; isn't that correct?

A. If I were delayed, yes, sir.

Q. Well, I say, you were the man in that crew to protect the rear end if it needed to be protected?

A. Why, my duty was to see that it was protected in case it was delayed.

Q. Now, what means were provided for protecting the rear end of your train from collision with the following train?

84 A. You mean what means the company furnished for signals?

Q. Yes, what precautions were taken at that time?

A. Why, in case the train was stopped, we would send a flagman back, and if at night time, a red light, to stop any approaching train that might be coming.

Q. With a red lantern?

A. Lantern, yes, sir.

Q. In case your train was not stopped, then, of course, you could not send a flagman back, could you?

A. No, sir.

Q. If for any reason, your train slowed down so that there was ground to anticipate that some other train might be overhauling you from the rear, what was customarily done?

A. Well, if you were delayed and your speed was reduced down to a very low rate of speed, why, at night time, you would throw off what was known as a fusee.

Q. If, for instance, you were running along on the main line and your engine was working badly, and you could not make the time that you were expected to make and you knew by the time card that some other train was approaching you, pretty rapidly from the rear, then you would throw out a fusee?

A. Yes, sir.

Q. Just describe those fusees to the jury.

A. A fusee is something I suppose most an inch across
85 and is about something like from ten to twelve, possibly fourteen, inches long

Q. An inch in diameter and round?

A. An inch across the end.

Q. Something like the end of a sky rocket?

A. Yes, sir; and they are fixed on one end with a steel spike that you can drop them and they will stick up in the rail, if you happen to hit the rail, so that it doesn't break off, and then a cap that you take off the other end and rub the two ends together, which causes a light, burns a red light; we drop those off.

Q. Are there two kinds or fusees?

A. Yes, sir, there was the red and yellow fusee.

Q. What did the yellow fusee indicate?

A. It indicated caution.

Q. And how long would the yellow fusee burn after it had been lighted?

A. I don't know.

Q. Approximately how long?

A. I suppose something like five minutes.

Q. And therefore, if you were just temporarily delayed and were fearful that some other train might be overtaking you, you might drop off a yellow fusee, which would burn five minutes, and then any succeeding train coming along and seeing this yellow fusee, would immediately be brought under control, that is to say, the speed would be so reduced that it could be stopped within the distance that the engineer could see a train ahead on the track; is that right?

A. Yes, sir.

86 Q. That is what would happen if the yellow fusee was dropped off?

A. Yes, sir.

Q. And on the other hand, if a red fusee was dropped off the back, the following train coming upon this red fusee, would be obliged under the rules, to stop there until that had burned out.

A. Yes, sir.

Q. Which would be ten minutes after it had been lighted?

A. I never timed one, I don't know.

Q. It is your understanding that is about the time?

A. Yes.

Q. And these fusees were very easy to drop off the rear of the caboose?

A. Yes, sir.

Q. At that time, did you have these fusees in your caboose?

A. Yes, sir.

Q. You had a supply of them?

A. Yes, sir.

Q. And if you had thought that there was any reason to use

them under the circumstances, you might very readily have done so?

A. Certainly.

Q. Mr. Peery, you were familiar at that time with that portion of rule 99 which reads as follows: "Conductors are responsible for the full protection of their trains in both directions and under all conditions?"

A. Yes, sir.

87 Q. Also with rule 11-B, reading as follows: "Flagmen who use fusees by day when weather conditions obscure day signals, and also when necessary to signal another train when their train is running too rapidly, to allow flagman to get off?"

A. Yes, sir.

Q. And also with rule 11, reading as follows: "A fusee burning red, on or near the track must not be passed until burned out; when burning yellow it is a caution signal?"

A. Yes, sir.

Q. I have here a large map, which we will call Def't's Ex. 1.

The Court: Showing the locus?

Mr. Hoke: Yes.

Q. Turning this map over until we get to the vicinity of Camp Creek, I will ask you whether you can indicate on the map where the collision occurred with reference to the bridge over Camp Creek?

A. That map does not show the curve as it exists there.

Q. Oh, you don't think this map is correct?

A. No, sir, I don't think so because you come in, as I understand that map—this is the south end of the map.

Q. No, that is the Paducah end.

A. Now, which one of these—that indicates the railroad, does it not?

Q. Yes, the heavy black mark.

A. The map does not give that curve.

Q. The map is not correct with reference to the degree of curvature shown in the track?

88 A. It does not appear that way to me.

Q. Well, we have testimony in respect to that—testimony of engineers. Now, without committing yourself upon the question of degree of curvature, possibly you can tell us about how far from this bridge, across the stream known as Camp Creek, the collision occurred—how far either north or south of it.

A. That you say is the south end of the line—Fulton?

Q. Yes, this is Fulton and that is to the north.

A. Somewhere about 27 to 30 cars north of this Camp Creek. Of course it doesn't look to me like the line.

Q. I want to get the distance.

A. Of course I don't know where the accident occurred, but as I understand where I was picked up, it was somewhere 27 to 30 car lengths from this trestle.

Q. From the trestle across Camp Creek?

A. Yes, sir.

Q. And you speak in terms of car lengths—you have in mind a car as being about how long?

A. Well, they range, I suppose, from 36 to 40 feet.

Q. And I believe that you have stated that at the time of the collision, you had left the curve in the track at Camp Creek, and gotten out onto the piece of straight track, somewhat north of that?

A. Yes, sir, north of Camp Creek trestle.

Q. Is the Camp Creek trestle on a curve?

89 A. It may be, it is a very slight degree of curvature where the trestle is.

Q. Curving which way?

A. Curving to the left as you are going north.

Q. That would be to the west?

A. Yes.

Q. And what is your recollection as to how far north of the Camp Creek trestle, the curve ends?

A. I don't remember just how far, or I don't remember for sure that it is absolutely on the curve; my recollection is that the curve extends for a little distance after you cross the trestle going north.

Q. How far would you estimate it, if you can do it?

A. My recollection is now that it is about two or three or four cars, somewhere along there.

Q. As you approach Camp Creek trestle, you are running on a curve, are you not?

A. Yes, sir.

Q. That turns to the right hand or the east side?

A. That curve is a gradual curve to the left, which would make it, as I understand it, around to the west all the time.

Q. I thought you said it was kind of a reverse curve?

A. Well, back of that, between that and Boaz, you have a curve to the right, and then a short space of straight track, and then a curve to the left.

Q. How far south of Camp Creek trestle does that stretch of straight track begin?

90 A. Well, it is around a big curve there, I presume it is something like half a mile.

Q. And then how much straight track was there south of the point where this curve, leading to Camp Creek bridge, began?

A. Why, something from a quarter to a half a mile, I don't know just how far.

Q. Was there glass in the back door of your caboose?

A. Yes, sir, that is, a portion of the door was glass.

Q. The upper portion of the door?

A. Yes, sir.

Q. Were there windows at the sides of the door?

A. Yes, sir.

Q. There were therefore three places that you could look out, really three windows to look out through the back of your caboose?

A. Well, you could slide the side door and look out that, or you could look out the rear door, that side door on either side. There is a sliding door, a door that you could catch hold of and unfasten, and slide back.

Q. No, but what I was trying to get at was the question whether there were windows alongside of the door at the back of the caboose?

A. No, sir, no windows at the side.

Q. The only way to look out of the back of the caboose, was to look out of the glass in the door?

A. Yes, sir.

Q. Any curtains on those windows?

91 A. No, sir.

Q. They were this ordinary white glass, I suppose?

A. Yes, sir, they were panel glass.

Q. Could you look through the windows of the door, if you were sitting at this desk?

A. Not without raising up and stepping nearer to the center of the caboose. That is, I mean I could not see straight down the track.

Q. Couldn't you lean back this way in your chair, and look out through the glass in the door, or was the lower end of the glass so high that you couldn't see through it? In other words, could you sit at your desk there, at work, and occasionally lean back and look back along the track?

A. I didn't sit in my chair to do my clerical work.

Q. What did you sit in?

A. I sat on the caboose seat—a stationary seat in the caboose.

Q. And that ran lengthwise of the side of the caboose?

A. Yes, sir.

Q. Well, from that position, could you look out through the glass in the back door?

A. No, sir.

Q. And see a train coming from the rear?

A. No, sir.

Q. Did you have any chairs in the caboose?

A. We had one, yes sir.

Q. Where was Warford sitting?

A. Warford was—I don't remember whether Warford

92 were sitting down or standing up at the time of the collision.

Q. Well, now, if you had chosen to do so, could you have sat in the chair near enough to this table to enable you to write, and while sitting in that position, could you have looked back through the glass in the rear door occasionally, to see if trains were coming from the rear?

A. I don't think that a person would be high enough, sitting in a chair, I think you would have to raise up.

Q. Well, then the fact is that while you were at work on your reports, there, you were not in a position to look out for trains coming from the rear, were you?

A. No, sir.

Q. You had started in writing out your reports, at Boaz?

A. After we passed through Boaz, yes, sir.

Q. And how long was that before the collision?

A. Well, I don't know, it was somewheres I suppose from 7 to 10 minutes.

Q. Had you looked back at all between the time that you left Boaz and the time of the collision?

A. Why, I don't remember whether I looked out, except as we came off the straight track, and entered a curve just north of Boaz.

Q. You looked back over the stretch of straight track?

A. Yes, sir.

Q. You got up from the table, did you, to go over there and look?

93 A. No, sir, I was sitting in the side door, and got up and went to the rear door and looked back, and then went to my clerical work.

Q. Well, do you refer to the straight track just before you made this curve that leads on to Camp Creek?

A. No, sir; I refer to the straight track running through Boaz to a point about one-half mile north and a point something like two or two and one-half miles to three miles south of Boaz.

Q. So that just as you left that stretch of straight track, you did look back?

A. Yes, sir.

Q. Looking out the side door?

A. No, sir, I was sitting in the side door, and got up and had to walk backward to get to my writing desk and walked to the rear door and looked out and then turned and sat down and began my clerical work.

Q. And if second 180 had been on the straight stretch of track there, you could have seen it four miles behind you, or would you say two and one-half miles south of Boaz and one-half north?

A. No, I didn't.

Q. What did you say?

A. I said for a distance of about half a mile north of Boaz and something more than two miles south.

Q. Well, then, approximately three miles of straight track?

A. I think so, yes, sir.

Q. And if they had been within three miles of you at that

94 place, you would have seen the headlight, on Robertson's engine?

A. If it had been burning, yes, sir.

Q. Assuming that it had been burning, you would have seen it at that time?

A. Yes, sir.

Q. It was a nice, clear night?

A. Clear night, yes, sir.

Q. And the headlight on that engine of Robertson's was such that you could have distinguished it at a distance of three miles back along a straight track?

A. Yes, sir, if it was burning.

Q. That is not a thickly settled community there, is it? Not thickly settled around the track, is it?

A. You mean from along this point or portion of straight track?

Q. Yes.

A. No, sir, there is the Mayfield creek bottom there, that there is not many people live in.

Q. Not so many people there?

A. No, sir.

Q. Consequently, not many lights on the horizon?

A. No, sir.

Q. How far is that last place that you looked back, from the place where the collision occurred?

A. Something like three miles, I suppose.

Q. And during all that time you were running about how fast?

A. 20 to 25 miles an hour.

95 Q. Why did you look back at that time?

A. I looked back from force of habit.

Q. It was natural for you to watch the rear, to look back along the track to see that you were not being overtaken. Why didn't you look back as you left that piece of straight track just before you went on to this long curve around to Camp Creek?

A. I don't understand?

Q. I say, why didn't you look back as you left that piece of straight track, just before you went on to this long curve around to Camp Creek?

A. I was busy making out my reports.

Q. Why didn't you have some of your men look back?

A. Because I didn't think it necessary.

Q. It didn't occur to you, is that it?

A. Well, if I thought anything about it, I would not have required my flagman to have looked out, if I hadn't been busy—as I was.

Q. If you had thought there was any danger at all of being overtaken by this second train, of course it would have been very easy for you to have avoided the accident by just simply dropping out a fusee?

A. I beg your pardon.

Q. I say if it had occurred to you that there was any danger of a rear end collision, it would have been very easy for you to have prevented the accident by simply dropping out one of those fusees?

A. Why, if I had known that he was going to come, fol-

96 lowing me at that rate of speed, why certainly, if the fusee had been dropped off, he would not have run into me—that is, without running over the fusee.

Q. But assuming that he would not run by a fusee, that would have been a very simple way of avoiding the accident?

A. Yes, sir.

Q. What color light was your cupola light showing?

A. Showing a green to the rear and front.

Q. Now, the rule with respect to cupola lights is as follows, is it not, reading from the rule book, rule 19-A: "Cabooses equipped with revolving signal lamps on cupolas, must display green when running at full speed, and also when train is on siding, clear of main track; red must be displayed at the moment speed is reduced, and until full

speed is resumed." That is the rule that was in force at the time with respect to the cupola lights?

A. Yes, sir.

Q. Now, was the third light—on the cupola somewhat higher than the other two on the corners?

A. Yes, sir.

Q. What do you call those two lights on the corners?

A. We call them markers.

Q. And they show red, of course?

A. They show red to the rear and green on the main line.

97 Q. Red to the rear when the train is on the main line?

A. Yes, sir.

Q. And at the time of this accident they showed red?

A. Yes, sir.

Q. And you say that your cupola light showed green?

A. Yes, sir.

Q. Indicating that you were traveling at full speed?

A. Yes, sir.

Q. Now, you are positive about that, Mr. Peery?

(No answer.)

Q. You are very positive about your cupola light showing green, are you?

A. Well, I didn't turn it green myself, but I had my brakeman, one of my brakemen, he turned it green on leaving Mayfield and saw it was turned green.

Q. You saw that it was turned green leaving Mayfield?

A. Yes, sir.

Q. Meanwhile, between Mayfield and Camp Creek, there had been no circumstances—no slackening of speed—no stop——

A. No, sir.

Q. Which would require it to be turned red?

A. No, sir.

Q. So that, set as it was, a train coming up from the rear and seeing these lights on the rear of your caboose, the two red

98 markers and the green cupola light, would be justified in assuming that he was approaching a train that was moving under full speed.

A. Yes, sir.

Q. That is right?

A. Yes, sir.

Q. Before the crash came, did you hear any other sound?

A. No, sir.

Q. You didn't hear Robertson blowing his whistle?

A. No, sir.

Q. If he had blown the whistle near by, would you have heard it? Or was the noise in your caboose so great——

A. I could not have heard it on account of my two engines being so close to me.

Q. Were they working under steam there?

A. Yes, sir.

Q. You were just starting off up a little grade?

A. No, we were——
Q. Or was it about level?
A. It was possibly the least bit—slightly up grade.
Q. So the first intimation you had of anything being wrong was this sudden crash?
A. Yes, sir.
Q. And then you were stunned and the first thing you knew you discovered that you were on the ground?
A. Yes, sir.
99 Q. And then you found that your collar bone was broken off here and you pulled that back into place?
A. Yes, sir.
Q. And ultimately they put you on a seat or what remained of a seat in the caboose, and took you into engine 367?
A. Yes, sir, put me in the gangway; that is, between the tender and the tank—there is a doorway or gangway clear through.
Q. Now, at that time, while you were there, and when Robertson came up, did you also see Gorman there?
A. Why, I think so, yes, sir.
Q. And Warford?
A. Yes, sir.
Q. And did you hear Warford tell Gorman that you and Warford had been playing pitch at the time?
A. No, sir, I did not.
Q. You were taken to the hospital in Paducah?
A. Yes, sir.
Q. And who was the first doctor that treated you there?
A. Dr. Taylor and Dr. Willett.
Q. How long were you in bed at the hospital?
A. I only remained at the hospital five days and nights.
Q. And during all that time you were in bed?
A. Yes, sir.
Q. Is Dr. Willett any relation to Mr. Keef's representative
100 in that country there—Sam Willett?
A. I don't know.
Q. When you got home what doctor treated you first?
A. Dr. Acree.
Q. Did you walk home or did you go home in a carriage or ambulance?
A. Went home in the ambulance.
Q. How long did Dr. Acree treat you?
A. I don't think Dr. Acree made but a couple of trips out there.
Q. Was Dr. Acree connected with the company at all?
A. Not that I know of.
Q. How long after Dr. Acree quit treating you was it before you got another doctor?
A. I don't remember what time Dr. Gilbert began work on me; it seems to me it was some time in the latter part of February or possibly March.
Q. So there was quite an interval there between Dr. Acree and Dr. Gilbert?

A. Yes, sir.
Q. During which time you were not being treated by anybody?
A. No, sir.
Q. Were you yourself doing anything by way of treatment?
A. Nothing only taking medicine to keep my system in as good condition as I could.
Q. Tonics or something like that?
A. Yes, sir.
101 Q. And you were not massaging or doing anything of that sort?
A. No, sir.
Q. Then Dr. Gilbert treated you some along in February?
A. I don't remember whether it was February or March, or whether it extended through February into March.
Q. What kind of treatment did he give you?
A. Osteopathic treatment.
Q. And in a general way what did they consist of—what did he do?
A. Why, I believe they call it working you out, rubbing the muscles you know, and work——
Q. Kind of massage?
A. Yes, sir.
Q. And did he say that any bones were dislocated?
A. Yes, sir.
Q. Told you that there were some bones out of whack?
A. Yes, sir.
Q. And did he get your back in place again?
A. No, sir.
Q. Did he say he could do it?
A. Why, he told me that he couldn't or wouldn't insure that he would ever get them back?
Q. Well, how long did he try to get them back?
A. I think he gave me nine treatments, is my recollection now.
Q. What was the occasion of your quitting his treatments?
102 A. Because I didn't think he was doing me any good.
Q. He was not getting the bones back in place that he claimed were out of place?
A. No, sir.
Q. Well following that, who treated you?
A. I didn't have anyone treating me after that.
Q. Up to the time of the trial of this case in December, 1912?
A. No, sir.
Q. That is, from March, 1912, to December, 1912, you didn't have anybody treating you?
A. No, sir.
Q. And in fact, you have not since then, have you?
A. No, sir.
Q. In other words, nobody has treated you for two years; that is right, isn't it?
A. Well, it has not been quite two years.
Q. Well, substantially that?

A. Yes, sir.
Q. Within a month?
A. Something like that, yes, sir.
Q. But have you been taking tonics?
A. Why, if my system seems to need any tonic, I go and get something and take it, yes.
Q. You haven't been taking it regularly?
A. No, sir.
Q. Your general health is good, is it—or bad?
A. My general health is good.
Q. Appetite is good?
A. Reasonably so, yes, sir.
103 Q. Sleep fairly well?
A. No, sir, I don't sleep very good.
Q. You didn't do any work before the first trial, did you?
A. No, sir.
Q. When did you first meet Mr. Willett—Sam Willett—the agent for Mr. Keefe, in Paducah?
A. Well, I have known Mr. Willett for a good many years.
Q. Oh, was he working on the road there with you?
A. Yes, he switched in the yards.
Q. I mean when did you see him first about your case—since he has been in the business of soliciting cases down there?
A. Why, I don't know; I saw Mr. Willett it seems like it was in May or June, I don't know whether he was soliciting or not, it was in May or June I saw Mr. Willett.
Q. He told you about having himself had a case up here and won it?
A. No, sir.
Q. Didn't tell you about that?
A. What did you say?
Q. I say, didn't he tell you that he had had good luck up here in St. Paul with his lawsuit?
A. No, sir.
Mr. Anderson: The case had not been tried then, Mr. Hoke.
Q. Had he been injured before that time?
A. Yes, sir.
104 Q. Well, he was soliciting at that time wasn't he?
Mr. Anderson: No, sir.
Q. Well, then he was not instrumental in getting you to bring your case up here.
A. No, sir, nothing, only he gave me the address.
Q. Told you that his case was in the hands of these people up here, did he?
A. Yes, sir.
Q. Well, now, for several months prior to the first trial, were you under a salary of these people up here and were they paying you a regular monthly allowance?
A. No, sir.
Q. Did they at any time before the first trial?
A. No, sir, they never paid me a monthly allowance.

Q. Well, an occasional allowance, then?
A. Why, they have——
Q. Or possibly loaned you money—they might call it that?
A. They had loaned me some money.
Q. Well, was that money sent you in monthly installments?
A. No, sir.
Q. Just sent you occasionally as you needed it?
A. Well, I wrote to them more than one time and got some money.
Q. More than one time?
A. Yes, sir.
Q. How long before the first trial were you up here in St. Paul?
105 A. I arrived here on the night of the 26th of October, I believe it was.
Q. Then you stayed here until the trial?
A. Yes, sir.
Q. At their expense?
A. No, sir, I paid my own expenses.
Q. And you were paying your expenses out of money that they were advancing?
A. I had mortgaged my home at Paducah for money.
Q. But then that was not enough to supply you, you had to borrow some money at that.
A. Well, I don't know that that money that I had mortgaged my place for had given out at that time.
Q. Yes, but what I want to understand is that you were also at that time borrowing money from Mr. Keefe's Agency?
A. Why, I possibly got some money from Mr. Keefe while I was here, yes.
Q. But you didn't live at any regular place here, maintained by Mr. Keefe?
A. No, sir.
Q. You were living at some hotel by yourself?
A. Yes, sir.
Q. I say you were not living with a lot of other men who had claims against railroads, you were living off by yourself in some hotel?
A. No, sir, there was no one else there.
Q. Now, after the case was decided, did you go home very soon?
A. Yes, sir, I went home tolerably quick after the trial.
106 Q. How soon after?
A. Well, I left here on the 23rd, I believe, of January.
Q. And immediately upon your arrival home, did you make any plans to go into business or do anything to earn any money?
A. Why, no, sir, I didn't go in business for some little bit.
Q. Why not?
A. Because I couldn't find any business I could get into to make any money.

Q. You were just looking around for some opportunity that would be suitable to your ability?

A. Yes, sir.

Q. After the case was temporarily lost the first time, did they keep on advancing you money?

A. Why, I don't think that I ever asked them to loan me some money that I was refused, at any time.

Q. Some time in April, you started up this feed business, is that correct?

A. Yes, sir.

Q. That would be April, 1913?

A. Yes, sir.

Q. And was your feed store near your home?

A. Possibly a little bit over a block.

Q. On what street in Paducah?

A. You mean the feed store?

Q. Yes, sir.

A. It is on Tennessee street.

Q. And your home is on what street?

A. Sixteenth street.

107 Q. Mr. Robertson lives right near you there, does he not?

A. He lives on the corner of Sixteenth and Tennessee.

Q. You saw him frequently in the feed store, did you not? While you were in business there?

A. Yes, sir.

Q. Sold him a bale of hay and a bag of feed occasionally?

A. Yes, sir.

Q. He had a couple of horses, didn't he?

A. Well, I had one all the time and two part of the time.

Q. You and your boy were running that place?

A. Yes, sir.

Q. Your boy is here at this time?

A. Yes, sir.

Q. How old is he? I have not seen him.

A. He is 15 years old.

Q. Is he right here?

A. Right back there.

Q. You were the only two who did whatever work was required to be done around there?

A. Well, sometimes neighboring boys would be there—anything that would go out they would help load it, and sometimes they went with the little boy to deliver the stuff.

Q. And then in that event, you would be left alone?

A. Yes, sir.

Q. How big were those bales of hay that you were handling?

108 A. They ran from about 65 to something like 100 pounds.

Q. I believe you said the oats bags would sometimes weigh 160?

A. That is, five-bushel bags.

Q. Then there would be all sorts of sizes of feed bags?
A. I always got the smaller sacks when I could get them.
Q. But when you couldn't get them you got the big?
A. I had to take five-bushel bags.
Q. Do you remember selling a bale of hay to Mr. Robertson, and yourself taking it out and throwing it on his buggy?
A. No, sir.
Q. You do not remember that?
A. No, sir.
Q. Did you ever do that for anybody?
A. Why it may be that I did, yes.
Q. Is it fair to say that over a period of months, there, you were regularly handling these big and small bags of feed and bales of hay and taking them out and throwing them on wagons?
A. Well, I was regularly there every day, that is, except Sundays, and I could not take the bags out and throw them on a wagon or anything of the kind.
Q. How did you get them on?
A. I had to drag them out there, and work them around the best way I could to get them on the wagons; ordinarily the people
109 who bought them would help me, or put them on themselves.
Q. Well, now, were you as stiff then as you are now, was your arm as stiff during that time as it is now, or do you find that coming up here has, for lack of use, stiffened it up a little bit?
A. I don't think it is any worse than it was then.
Q. You think then, that your arm, during all this time, was not, because of use, any more flexible than it is now?
A. I don't see any particular difference in it.
Q. And the same applies to your neck and your back?
A. I don't see any change.
Q. Are we to understand that in moving around that feed store you went around with the same caution that you do now?
A. The cooler the weather the more it hurts. Of course, in hot weather, it don't hurt like it does in cooler weather.
Q. I thought possibly there might be some explanation like that. Take the cool, raw, weather, like we have had here and you feel that you are a little bit stiffer than you would be in a nice, warm summer in Kentucky?
A. Yes, sir, a person that way, the cooler the weather, the more they hurt.
Q. Did you ever shovel any coal out of a car into a wagon?
A. No, sir.
Q. You never did that?
A. No, sir.
110 Q. Not at all?
A. No, sir.
Q. Did you deal in coal?
A. No, sir.
Q. Now, as to the time when you quit this business—because you say it brought so small returns, you say you made a net of thirty dollars a month, from it—when did you quit the business?

A. Some time along the first of October.
Q. Wasn't it along about the first of November?
A. No, sir.
Q. What is there in your mind now that fixes the date when you gave up the business?
A. Well, one of the main things that makes me know it was in October was on account of the telephone, that I didn't pay on the telephone after the 15th of October, I had a telephone in the business place.
Q. Oh, did the 15th of October mark some period in the telephone service? That is, when the month ran out?
A. That was when the month ran out when my telephone rent was due.
Q. And you didn't pay beyond that?
A. No, sir.
Q. Was there anything else that would fix the date in your mind?
A. Not that I can think of just now.
Q. Didn't you just about that time hear from Mr. Anderson that your case had been reversed in the Supreme Court and that you were going to have another chance at it?
111 A. No, sir, I don't think so.
Q. When did you first hear that?
A. I don't remember now when I heard that; I really don't know, I don't remember now when the decision was given.
Q. Well, the case was decided in the Supreme Court on October 31, 1913. Now, how long after that did you hear or learn of the fact that you had been granted a new trial?
A. Why, it was after I had quit the feed store.
Q. After you quit?
A. Yes, sir.
Q. In other words your quitting the feed store had nothing to do with the fact that you——
A. Nothing on earth.
Q. —had another chance here?
A. No, sir.
Q. Then, was there some little interval between your quitting the feed store and your going into this other business that you get three dollars a week for now?
A. Yes, sir.
Q. What were you doing then?
A. I wasn't doing anything.
Q. Wasn't there some time when you were selling pop?
A. That was last summer when I was in the feed store.
Q. Oh, at the same time?
A. Yes, sir.
Q. Then how long after you quit the feed store did you get into this other work?
112 A. Well, that was from the time that I quit the feed store in October until about New Year's.
Q. Since New Year's you have been doing this little work of answering telephones?

A. Yes, sir.

Q. You spoke of using a gun, both a shot gun and a rifle; I take it you have been out hunting a little bit, or been out trying your gun?

A. I have been out trying to kill some game, yes.

Q. Where were your hunting headquarters there?

A. Why, ordinarily when I could get away and use my shot gun I would go up the Ohio river in the winter season duck hunting.

Q. Well, did you go hunting at all?

A. I went up the river with a gasoline boat with Mr. Stanchfield.

Q. And you found that you could not stand the jar incident to the discharge of the shot gun?

A. Well, I didn't find that out at that time, I didn't take my shot gun with me that time.

Q. What did you take with you?

A. I took my rifle.

Q. Oh, you can shoot ducks with a rifle, can you?

A. I didn't shoot at any ducks, I don't believe. I shot at some geese on a sand bar.

Q. Oh, I see, you were after geese then. And you could shoot the rifle all right, but you had to put it in an unusual position in order to get the sight?

113 A. I could shoot a rifle at anything still, you know.

Q. But the shot gun you couldn't use?

A. No, sir.

Q. Mr. Peery, I meant to ask you why you left the hospital.

A. Why, I left the hospital there because I didn't like their treatment there.

Q. You, of course, had the right to remain there indefinitely?

A. Yes, sir; in the first place I didn't want to go there, asked them not to take me there.

Q. Now, did you leave pursuant to any arrangement that you made, or did you just go?

A. My brother and nephew came to take me home. They helped me to the ambulance and the hospital furnished their ambulance to take me home. And also I believe Mr. Dan Harper assisted me.

Redirect examination.

By Mr. Anderson:

Q. Mr. Peery, I think two or three questions I forgot. First, in regard to the loading of the grain and stuff, when you were running this little feed store, where would the wagons of customers, or your wagon be, when you would load hay or sacks of merchandise in it?

A. They would back up to the front porch.

Q. To the front porch?

A. Yes, sir.

Q. Sort of a platform?

114 A. Yes, sir, platform.

Q. And then how high was the wagons that you loaded relative to the platform?

A. I suppose, something like 8 to 12 inches.

Q. So they just stuck above the platform eight or twelve inches?

A. Yes, sir.

Q. Now, you have been asked some questions in regard to some rules. You, as conductor were quite familiar with this book of rules, I take it.

A. Yes, sir, I think so.

Q. And were you familiar with the rule that has been quoted, known as rule 11, as to the fusees that burn red?

A. Yes, sir.

Q. You knew about that rule?

A. Yes, sir.

Q. Rule 11 here says, "A fusee burning red on or near the track must not be passed until burned up; when burning yellow it is a caution signal." That is as you remember it, is it?

A. Yes, sir.

Q. Rule 11-B: "Flagmen should use fusees by day when weather conditions obscure day signals, and also when necessary to signal another train when their train is running too rapidly to allow flagmen to get off." Now will you kindly explain, as an experienced conductor, when and under what circumstances you were in the habit or train men were in the habit of using fusees, under conditions described in the latter part of 11-B?

A. That is in case they are pulling a hill, you know, with a

115 heavy train, and the engine is near stalling or in case that there has something gone wrong with the train or the engine that they can't make a reasonable rate of speed.

Q. You may state whether or not on this trip from Mayfield to the point of the accident, anything occurred in connection with your train which would require, as you understood it, the use of any fusees?

Objected to as calling for a conclusion.

Q. Was there anything that occurred on this trip that indicated to you, as an experienced conductor, the necessity of using any fusees, under any rule that you know of in the book of rules.

Mr. Hoke: I still make my objection that the question calls for a conclusion on the part of the witness, which is not proper.

The Court: Well, he has told the conditions under which a fusee should be used. Under that rule, as I understand it, it is where his engine stalls, or something of that kind. Now, why can't he be asked if his engine did stall?

Q. Did your engine or train stall at any time out of Mayfield?

A. No, sir.

Q. You may state whether or not it slowed down from the speed it had attained after it got up speed out of Mayfield?

A. No, sir, it did not.

Q. And you have also had read to you rule 19-A: "Cabooses, equipped with revolving signal lamps on cupolas must display green when running at full speed and also when train is on siding
116 clear of main track. Red must be displayed at the moment speed is reduced and until full speed is resumed." I will ask you if there is any place that you know of in this book of rules from which that rule is read, defining what is meant by full speed. Is there any printed rule—I don't know.

A. Why, there is no special amount of miles per hour provided for.

Q. Then what do you understand is meant by the words "full speed" as contained in rule 19-A? What is meant by that?

A. I understand that meant to go at a reasonable rate of speed. It does not mean that he shall go sixty miles an hour, or anything like that.

Q. Does it mean that you must run your engine as fast as you can turn the wheels?

A. I don't think so.

Q. Were you ever told or instructed by any of your superiors as to the meaning of the words "full speed?"

A. No, sir.

Q. Then, in the course of your work as conductor, from day to day and from month to month and year to year, when running at night, at a speed of 20 to 25 miles an hour, what lights—green or red—did you display on your cupola?

A. Green.

Q. And what light did other conductors as observed by you, display on the Illinois Central system where you worked when they were running their trains at 20 to 25 miles an hour?

A. Green signals.

117 Q. What light did you display from your cupola while you are running from Water Valley to Mayfield, not to exceed 15 miles an hour?

A. We displayed green.

Q. You also had read to you a portion of rule 99, that being a rule occupying one page of this book, the last paragraph reads: "Conductors are responsible for the full protection of their trains in both directions and under all conditions." You were the conductor in charge of this train?

A. Yes, sir.

Q. And you considered yourself responsible for its protection?

A. Yes, sir.

Q. Did you ever understand that rule to mean, or were you ever instructed by any of your superiors, that it meant to you as conductor that you should protect your train against another train following you and running into you where your train was running along in the ordinary way?

A. No, sir.

Q. And Conductor Gorman was also subject to the same rule, wasn't he, as to his train?

A. Yes, sir.

Q. I forgot one question, and that is with reference to the order that you had, numbered 87, limiting the speed of your train to 15 miles an hour and which you testified was given in duplicate to Mr. Gorman and also to his engineer. Now, as I understand that order as directed, you say that you were not permitted to run your train over 15 miles an hour?

118 A. That is correct.

Q. Are you familiar with orders of that character, where they limit the speed, and are given to the conductors of two sections, of trains, like number 1 and number 2?

A. Yes, sir.

Q. It is a common order, isn't it, where the trains are running in two sections?

A. Yes, sir.

Q. Frequent order?

A. Yes, sir.

Q. Well, now that portion of the order limiting the speed, does that have any meaning to the engineer and conductor in charge of the following train?

A. Yes, sir.

Q. And what does it mean to the conductor and engineer of the following train as to their speed and how they shall handle their train?

A. It means that they can't exceed a speed of 15 miles an hour, except where the track is clear and they can see that the first section is out of the way.

Q. I believe you did testify that in running these two sections it was Gorman's and Robertson's business to keep back ten minutes from you?

A. Yes, sir.

Recross-examination.

By Mr. Hoke:

Q. Now, Mr. Peery, I suppose "full speed" means average speed for that particular class of train; isn't that what it means?

119 A. I suppose so.

Q. If you were going 20 or 25 miles an hour at the time, it was proper for you to display a green signal, was it not?

A. Yes, sir.

Q. Under the circumstances?

A. Yes, sir.

Q. And if a passenger train were running say 10 miles an hour, that would not be full speed?

A. I don't think it would be considered as such.

Q. But it might be full speed for a very heavily loaded freight train?

A. Not at that particular point.

Q. Not at that particular point, going that way?

A. No, sir.

Q. Well, then it is fair to say that "full speed" means the customary speed at that place by that kind of train?

A. Why, I take it that it means something near the limit of the engine; that is the restriction, the superintendent's restriction on the speed limit of the engine.

Q. Something like that?

A. Yes, sir.

Q. Now, if, as a matter of fact, you were displaying a red signal in the cupola, then that would indicate that you were not running 20 or 25 miles an hour, isn't that right?

A. Yes, sir; that indicates——

Q. It might indicate that you were either running something considerably less than 20 or 25 miles an hour or that you were
120 in fact stopped, wouldn't it?

A. Either reduced speed, or stopped. The lamp is turned so it will show red to the rear and front?

Q. And, of course, if you had stopped at that point it would have been your business, or the business of one of your flagmen, to run right back and flag?

A. Yes, sir.

Q. Now as to the restriction of 15 miles an hour in the speed of the first section of a train, would it not make some difference to you if you were the conductor on a second section of a train, if you had been delayed a long time?

A. I don't see why it should make any difference with the second section.

Q. Well, suppose you were delayed a whole half day, wouldn't you be thinking that the other section, although limited to a speed of 15 miles an hour, would be in fact out of the way?

A. I might arrive at that conclusion, or conclude that he had had possibly the same delay that I had had.

Q. Might possibly have had the same delay that you had had?

A. Yes, sir.

Q. And so it depends on the individual, then?

A. Well, a man can arrive at different conclusions along that line.

Q. I don't suppose Robertson said anything to you at that time, about his figuring that you were out of the way, because he
121 had been delayed so long, and because he had a long heavy train?

A. No, sir.

Q. Nothing was said about that?

A. Not that I remember of.

Q. Well, now just one final question: Isn't it a fact that this accident could never have happened unless both of you had been negligent, both your crew and Gorman's? In other words, if you had both lived up reasonably to those rules, isn't it a fact that there could not have been this collision?

A. I don't see any negligence on my part at all?

Q. You don't?

A. No, sir.

Q. You don't think that you really ought to have put out any fusees there?

A. No.

Q. Or ought not to have looked back as you left that piece of straight track there?

A. I certainly don't think it was necessary for me to put out a fusee, and if I had looked back and seen this train coming, I guess I would have got caught, because I would have had about time to get on the platform when it occurred.

Q. And if you had looked back seasonably, before you got on to the curve, you could very easily have thrown out a fusee?

A. Well, I would have been throwing myself out, instead of throwing out the fusee if I had seen the headlight.

Q. Not, if you had seen it far enough back.

122 A. I could not have seen it far enough back around that curve.

Q. No, but I say you left the straight track there.

A. If I had seen him on the straight track, then it would not be necessary to have dropped the fusee, from the simple fact that he could see me, just the same as I could see him.

Q. Is that necessarily true, that he could see you as distinctly as you could see him?

A. Certainly.

Q. Well, now suppose that just at the moment he may have been engaged in working about his engine—of course an engineer can't sit there with his eyes riveted ahead all the time, any more than a flagman can sit in the back, looking back every moment.

A. Well, he is in better position than the conductor or flagman, from the simple fact that his face is turned forward and the conductor or flagman would have to turn around back, in order to see back.

Q. Well, then your position is flatly that this accident did not result at all from your own fault?

A. Certainly.

Adjourned until the morning of February 19, 1914.

Dr. HERBERT DAVIS, sworn on behalf of plaintiff, testified:

By Mr. Anderson:

Q. Doctor, you are a practicing physician and surgeon here in St. Paul?

123 A. Yes, sir.

Q. Admitted to practice under the laws of this state?

A. I am.

Q. A graduate of what medical college?

A. Rush Medical College.

Q. You have been practicing here for some twenty odd years, I believe?

A. Yes, sir.

Q. Are you able to tell us now the date or about the date that you first saw and examined the plaintiff, Mr. Peery?

A. It was in November, the forepart of November, 1913.
Q. How many examinations did you make as you remember?
A. Three at that time and one here.
Q. You made one recently?
A. Yes, sir.
Q. For this trial. The other examinations were made so as you could qualify and testify as to the conditions?
A. Yes, sir.
Q. At the former trial and at this also. Now, Doctor, will you tell this jury and the Court—make them a statement of the character of the examinations you made in 1912, in November?
A. Well, Peery came into my office, I looked him over very thoroughly and made an examination of his shoulder and his back and his clavicle (collar bone) and his breast bone, with particular reference, of course, to this injury; and also examined his heart,
124 lungs, abdominal organs—in fact, gave him a pretty thorough examination.
Q. And you made the same character of an examination three or four days ago?
A. Yes, sir.
Q. And I believe you also made an examination of him in 1912, with Dr. Ball?
A. Yes, sir.
Q. And Dr. Ball was present when you made the recent examination?
A. He was.
Q. Now, taking it up in detail, take the shoulder—the right shoulder I presume was the one?
A. The right shoulder.
Q. At this point, I will ask if there is anything wrong with the left shoulder at all?
A. No, sir.
Q. Now, will you tell the jury in your own way just what the conditions were in 1912 when you made the examination as to the right shoulder and arm, and, if any changes have taken place as disclosed by your recent examination, follow it up with that.
A. The right shoulder was a little higher than the left shoulder; the muscles were sore and tense over it, and the motions of the arm in the shoulder joint were limited; he could not elevate his arm, nor could it be elevated by assistance, quite to the horizontal position, it was between a horizontal position and a 45 degree position. When you attempted to move it farther than that it seemed to meet with some obstruction—and there was some form of blocking—
125 that prevented further movement. He did have a fair amount of backward and forward movement of the arm, and the arm could be rotated approximately half of its normal orbit this way (indicating). He could get his hand up to his head in 1912, as well as at present, by moving it up along side of the face, so as to get it up fairly to the top of the head. He complained of a good deal of pain on manipulation; there was also a thickening of the collar bone, about the middle third, indicating a previous frac-

ture. The condition at the present time was about the same. Possibly he could get his hand back of him a little bit more freely than he could before.

Q. Was there any noise or crackling in the shoulder joint on the movement in manipulation?

A. Yes, there was not only a probable but an audible sound as the shoulder is manipulated.

Q. To what extent, Doctor, in your judgment, would the condition you found the shoulder in on these examinations, interfere with the use of the arm in such manual labor as shoveling or handling a fork, pitching, climbing freight cars, where you have to put your hands up to the grabirons over your head and pull yourself up and work of that sort?

A. Anything that would get it beyond this angle of motion that he has, would be practically impossible; anything that he could do below this angle he could do. In climbing cars or shoveling or throwing bundles over his head, farm work, anything of that kind, would be practically impossible I should say.

126 Q. You heard his testimony in court yesterday?

A. Yes, sir.

Q. And I believe you heard it at the former trial?

A. Yes, sir.

Q. And I would ask you whether, in your opinion, the accident which he described would account for the condition of his shoulder, assuming, of course, the testimony to be true, and also assuming his testimony to be true that there was nothing wrong with his shoulder at all before this accident occurred?

A. I think so.

Q. And taking into consideration the condition you found the shoulder in at the former examinations, more than a year ago, and at the present time, and the further fact that it has now been something over 26 months since the accident occurred, what is your opinion as to the probabilities of improvement in the shoulder in the future?

A. I think he will never get the use, the full use, of this shoulder joint.

Q. And taking into consideration the testimony of the plaintiff that he can see no improvement whatever since the former trial a year ago in January, and also your own examination, where you say it is substantially the same excepting he can reach behind him a little better, is there any reasonable probability that the motion of the shoulder will become better?

A. No, since there is a slight improvement there now, but only in the backward motion, I think he will never have any

127 material difference from what he has at the present time.

Q. I will ask you whether or not there is a marked bow or bend to his back in the cervical region back of the neck and running down between the shoulders.

A. Yes, sir.

Q. You have had occasion, of course, many times as a physician, to see and observe bowed backs or stooped shouldered men, where

they become stooped from habit, sitting over at desks, and for various reasons, haven't you?

A. Yes, sir.

Q. How does the bend or bow in Mr. Peery's back, taking into consideration the way his head seems to sit, correspond with the ordinary stoop-shouldered shape?

A. The bend in the vertebræ is higher—it is in the cervical region—and it is also accompanied by a very marked muscular contraction, and a great deal of tenderness and soreness is elicited on examination, on pressure.

Q. And was that true the other day also when you made the examination?

A. Yes, sir.

Q. Does the soreness seem to extend down the spinal column?

A. It extends from the base of the neck to the lower dorsal region.

Q. You heard his testimony that previous to this accident he was erect as to his back, did not have a bow?

128 A. Yes.

Q. And also you heard his testimony that there has been no change, so far as he can tell, since the last trial, thirteen months ago? And assuming his testimony in regard to his back and conditions, both before and since the accident to be true, and taking into consideration your own physical examinations which you made of him, I would ask whether or not, in your opinion, the accident referred to would account for the conditions as to his back?

A. Yes, sir, I think it would.

Q. Do you think, Doctor, there is any reasonable probability of improvement in the back and in the neck as to its shape or contour, in the future?

A. I think not.

Mr. Hoke: That is objected to as incompetent, as not stating the proper test of permanent injury.

The Court: Doesn't it ask for the doctor's opinion?

Mr. Anderson: Yes.

Mr. Hoke: I understand the rule, with respect to requirements of proof as to permanent injury, that it must appear that the injury is likely to be permanent to a reasonable certainty.

The Court: I think he can answer.

Exception by defendant.

A. I think not.

Q. I think you testified that there was a thickening of the collarbone?

A. Yes, sir.

129 Q. You call it the clavicle I believe.

A. Yes, sir.

Q. Could you tell from that examination as to the cause of the thickening?

A. It indicates previous fracture.

Q. How about what we call the breast bone, the sternum, is there anything abnormal there?

A. The breast bone, the upper part of it, was bowed out, reversely, from the back; that is, the back was bowed posteriorly.

Q. What is the normal shape of the breast bone or sternum?

A. The upper part is nearly straight; the lower part has a curve.

Q. Then this bow that you speak of is abnormal?

A. Abnormal.

Q. Doctor, the testimony here in effect is that previous to this accident the plaintiff's height in his stocking feet or bare feet was five feet eight and one-half inches; that he was measured yesterday and that his height was five feet six and one-quarter inches; assuming that testimony to be true, are you able to account for the diminution in height, of two and one-quarter inches?

A. I think I testified in the previous trial that this injury looked as though it was a telescoping or smashing down and that might easily account for a difference in height.

Q. And when you speak of a telescoping or smashing down——

A. Some blow from above with enough force to bend or
130 displace the vertebræ and the breastbone.

Q. What is the real name of the rays with which X-ray photographs are taken?

A. The Roentgen rays.

Q. X-ray pictures?

A. Yes, sir.

Q. Were they taken of the plaintiff's shoulder?

A. They were.

Q. And of the back, both front and rear, I believe?

A. Yes, sir.

Q. That was back in 1912?

A. Yes.

Q. And then speaking generally, they are known as shadow pictures, are they not?

A. Yes, sir.

Q. In other words, by that process, the shadow of the bone, the bony structure, is thrown upon the plate?

A. Yes.

Q. So that you can see the bones and their outlines?

A. Yes, sir.

Q. To a greater or less extent. You had those taken for the purpose of seeing if there was any fracture or displacement?

A. Yes, sir.

Q. That would be shown in the pictures?

A. Yes, sir.

Q. The pictures did not disclose any broken bones?

A. None, except this fractured clavicle.

131 Q. And so far as they showed or disclosed, did they disclose any displacement that was perceptible in the photographs?

A. No, sir, no pronounced displacements.

Q. Were you able to form an opinion or to come to any conclusion as to where the trouble is in the shoulder?

A. Not definitely, only an idea that it was in the cavity of the shoulder joint, but that was not an absolute and positive conclusion.

Q. Would that be anything that would be disclosed in the X-ray photograph if it was in there?

A. It might, or might not be disclosed.

Q. Does that have anything to do with what you speak of commonly as rigidity of the muscles in connection with the back where it is bent or bowed?

A. A great deal; this contraction that I spoke of is a rigidity and a contracted condition of the muscles.

Cross-examination.

By Mr. Hoke:

Q. Doctor, in making these examinations you, of course, did so at the request of Mr. Anderson?

A. Yes.

Q. And in forming your opinion then, and in expressing them now, you are proceeding upon the theory that the plaintiff is telling the exact truth, with respect to his pains and his various symptoms, are you not?

A. Well, yes, to a great extent, except as far as the actual findings there.

132 Q. Yes, but in stating your opinion, you rely upon the truthfulness of his statements, in part?

A. In part, yes, sir.

Q. In part upon the truthfulness of his statements, in part upon such things as you yourself have been able to observe?

A. Yes, sir.

Q. Now, if, for any reason, his statements should prove not to be accurate, that would modify your opinion very largely, would it not?

A. It would modify my opinion as far as the amount of pain—that is a subjective symptom, of course—but not as far as the demonstration that you can make in regard to the motion of the shoulder.

Q. It would modify your opinion, of course, with respect to his back, if instead of telling you that formerly he was erect, he told you that he was a very round shouldered man?

A. Exactly, yes, sir.

Q. If you have that hypothesis to proceed upon, why, of course, you would conclude that this accident had nothing to do with the curvature of the spine—isn't that right?

A. Yes, sir, that is true.

Q. You have also not had the advantage of knowing what the various doctors who originally saw and observed and have said with respect to what they observed?

A. No, sir, I have not.

Q. You have not taken that into consideration.

A. I have not heard that.

133 Q. If you were approaching this matter scientifically, we will say with a view to reading a paper before some medical society upon a disputed case, instead of simply preparing yourself

for testifying in a lawsuit, wouldn't you want very much to know what the doctors who originally examined him immediately after the accident, observed?

A. Why, it would be confirmatory possibly. I think under those circumstances I would also not consider it necessary to do any detective work, I would believe him. I would believe what he said, I mean.

Q. Well, I didn't mean to say that you would want to know what the doctors had observed for the purpose of contradicting him, but rather for the purpose of getting the benefit of their expert observations at the time?

A. I think it would be very wise.

Q. Be very wise and would be helpful toward arriving at the truth?

A. Yes, it would be helpful, if they were men of intelligence, of course, that were giving this opinion.

Q. Mr. Anderson has not even called your attention to what those doctors said, has he?

A. No, I have seen or heard no testimony about what their opinion was.

Q. Now, would you say, Dr. Davis, that between doctors there might very well be a reasonable difference of opinion about this man's condition? I am not asking you now to characterize our doctors who disagree with you, and if you feel that the effect of my
134 question is that, why then I don't want you to answer, because we don't want one doctor to come on the stand and say that he believes that another doctor is not telling the truth; but are you prepared to concede that the conditions of this man's case are such that doctors might very well have a difference of opinion as to whether he is in fact suffering from any impairment of the motion of his shoulder? In other words, are the conditions, to your mind, sufficiently obscure so that you can see that some other man might very reasonably differ with you in the conclusions that you draw?

A. Yes, of course, we can differ on any subject and exactly, Mr. Hoke what do you mean, whether this is a case of simultation or is not?

Q. Now, I wouldn't want to ask you that at all, because that is a question for the jury—whether this man is telling the truth—I wouldn't even ask our doctors that; but I mean, are the conditions sufficiently obscure to lead you to feel that there might very well be a difference of opinion between doctors as to whether or not the motions of this man's shoulder are restricted as he says they are, depending upon whether or not he is telling the truth—and that of course I would not ask you to decide.

A. I think, Mr. Hoke, that in all these things except one test, that there might be some difference of opinion. There is no doubt but what this man's arm, when you got it up to a certain point, cannot be moved any farther; whether it could be broken
135 down or not is a question. On any of the other things, for instance, the contraction of the muscles of the back, and things of that kind, it might be an open question. As far as getting

the arm beyond a certain point is concerned, I don't think there could be any difference.

Q. You don't feel that he could resist putting the arm beyond a certain point?

A. No, he could not.

Q. By holding his muscles?

A. He could not resist—with the decided sensation that is given to the examiner of its meeting something fixed, something that is actually there, not a muscular contraction.

Q. Now there is, I suppose, an absolute way of demonstrating the question whether his arm can be raised, is there not?

A. By an anaesthetic.

Q. Yes. Now, in other words, if you doctors were to put Mr. Perry under an anaesthetic——

A. Yes.

Q. —it would be a very simple thing, wouldn't it?

A. Yes.

Q. No danger about that at all?

A. Well, I wouldn't say that there wasn't any danger—there is always some danger with anaesthetics.

Q. But very slight?

A. Very slight.

Q. If you would put him under an anaesthetic so that he could no longer himself resist the movement of the shoulder, you
136 could demonstrate to an absolute certainty whether there is any obstruction in there, which prevents the raising of his shoulder, could you not? You could determine whether it was real or a false stiffening?

A. Yes, sir.

Mr. Hoke (to Mr. Anderson): Will you consent to an anaesthetic examination?

Mr. Anderson: No, I will not consent to an anaesthetic; I should say not!

Q. Well, now that is a way of demonstrating it absolutely, is it not?

A. Yes, that would demonstate it.

Mr. Hoke: I never thought of that until this moment.

Mr. Anderson: I think we go far enough when we throw the door wide open and let your doctors make the examination.

Mr. Hoke: Well that is all right, that is up to you.

Q. To show how simple a matter an anaesthetic is, am I correct in my understanding that some people undergo anaesthetics to have their teeth pulled?

A. Yes.

Q. And for very slight operations?

A. Yes. There have also been some deaths you know.

Mr. Anderson: I think I will object to this line of examination as wholly immaterial.

The Court: Oh yes, the doctor has told you frankly that it is

a slight operation, but there is danger,—and everybody knows it.

137 Q. Well, there is not much danger.

Mr. Anderson: Well, I object to the examination as immaterial.
The Court: I understood him to say it was slight.

A. Well, if it is in the ratio of the great number of people that take it, in that way I should say there was not, but there have been deaths, from it.

Q. Is it any more dangerous than taking an X-ray picture?

A. Oh yes, so far as death is concerned.

Q. You burned Mr. Peery the last time—I don't mean to say you did, but whoever took the pictures burned him slightly.

A. That is not a serious matter—an accident.

Q. Now your opinion as to the precise reason why his shoulder cannot be raised, is not a definite opinion, is it?

A. Not as far as the cause of it, no, it is not a definite opinion.

Q. In other words, so far as your experience goes, his is a unique case?

A. Exactly.

Q. You have never seen anybody else presenting the same conditions?

A. No, not the same conditions.

Q. Ordinarily these X-ray pictures would disclose the cause of not being able to elevate the arm?

A. No, if he had an inflammation of the joint, a thickening of the membrane with adhesions in the joint, it would not show
138 that, it would only show a fracture, or a new bony growth. But it would show nothing was indicative of soft part conditions.

Q. No, if his shoulder were inflamed and the tissues on the inside of the joint were inflamed, of course these pictures would not show.

A. No, they would not show, or if the membrane of the joint had been denuded as the result of inflammatory condition, if there is a real sloughing in there, it would not show that.

Q. Of course, if that occurred, he would not be able to move.

A. He might have some motion; he might have some slight motion even then.

Q. Of course he would not have any motion while the joint was in the inflamed condition?

A. No; it would be exceedingly painful.

Q. When a particular portion of a body is not used to any considerable extent, there is always a certain amount of what the doctors call atrophy?

A. Yes.

Q. In other words, if I should tie my arm up in a sling for a long time, it would sort of wither away?

A. Yes, get smaller than the other.

Q. If you should undertake to examine me now, and I should

tell you that I had my arm in a sling for a year, and had not been using it, and you looked at my arms and you saw that the muscular development of both arms, was substantially the same, you would at once conclude that I was mistaken about——

139 A. If you had not moved that arm at all, why I should say that you had been mistaken about it.

Q. What if I had only moved it very slightly?

A. Well, the degree of motion in order to prevent atrophy does not have to be very great, you know.

Q. Does not have to be?

A. Does not have to be very great, you occupy it enough for the exercise of nutrition of the parts and you don't get very much atrophy.

Q. So that in this case the fact that you observed no atrophy is not particularly significant?

A. No, he has had enough backward and forward motion and enough motion in the very act of breathing that elevates the shoulder, I think, to obviate that.

Q. So there is no atrophy here?

A. There is no atrophy.

Q. He is in a good muscular condition?

A. Yes, I should say so.

Q. Apparently, his right arm is strong?

A. Yes, I think it is fairly strong.

Q. Has a good grip?

A. Has a good grip.

Q. Do you know whether or not he is capable of lifting weights with that right arm?

A. I don't know about that, I didn't test him.

Q. You didn't test him on that. Now, of course this fracture of this little bone called the clavicle, does not amount to anything in the way of an injury, does it?

A. Not now, no, it is an excellent result.

140 Q. You would not say that the fracture of the clavicle here, to any extent permanently impaired him from doing anything?

A. No, I should say not.

Q. The breast bone, you said was abnormal?

A. Has an anterior bulge.

Q. You mean, sticking out in front?

A. Sticking out in front.

Q. To what extent does that disable him, if any?

A. Oh, I don't think that just the mere presence of that has much to do with it, there are no important muscles connected with it.

Q. So that is not an important injury at all?

A. No, I should think only in connection with the other injury, the condition of the back, that bowing one way and then the other, it is rather significant of the injury that he may have received.

Q. But in itself it is not a disabling injury?

A. No, I should say not.

Q. There are some of these sternums that stick out, are there not, in people who have sustained no injury?
A. There are malformations, yes, sir.
Q. Some people have what they call chicken breasts?
A. Yes.
Q. And they come there without injury?
A. Yes.
Q. It is also true that a great many men have pronounced curvatures of the spine that have sustained no injury?
A. Oh yes, as the result of disease.
141 Q. And also occupational?
A. An occupation, yes, sir.
Q. And men like Mr. A. B. Stickney, for instance, who are stooped over?
A. Yes.
Q. And I suppose you have observed very athletic men, who are very round-shouldered and had their spine bent over?
A. Yes, the fact of their being round-shouldered I don't think is any—they may be just as muscular.
Q. And just as able to do efficient work?
A. Yes.
Q. So that the mere curvature here, the curvature of the spine here, in itself, is not a disabling condition?
A. No, not unless it is accompanied by other conditions.
Q. Yes, unless it is accompanied by pain?
A. And muscular rigidity.
Q. The mere curvature in itself is not a disabling condition?
A. No.
Q. Your X-rays of course covered the spinal column?
A. They did.
Q. They did not disclose to you any deformity?
A. No, there was no fractures; the matter of deformity was difficult to tell through an X-ray, but there were no fractures that could be seen.
Q. Well, you could tell whether the vertebræ were in sub-
142 stantially normal positions in relation to each other?
A. Yes, I should say there was absolutely nothing, or practically nothing, detected by the X-ray.
Q. And so far as anything that you could tell from the examination is concerned, it may very well be that he had this round back before the accident?
A. Oh yes, he may.
Q. I mean independently of the question whether he is telling the truth or not.
A. Yes.
Q. So far as anything you can observe now is concerned, he may have had this round back before the accident?
A. He may have.
Q. Consequently it is fair, is it not, to say with respect to your testimony as to the matters which you yourself have observed, independently of statements made by him, that the only objective con-

dition you find—we will say now with respect only to the question of his shoulder—is this crackling sound when the shoulder gets to a certain point and stops?

A. No that is not all, you can't move it beyond that; that you find——

Q. Well, does it crackle before it gets there?

A. Well, it is approximately at the time it gets there.

Q. Substantially at the same time it gets to a certain point, you hear this crackling?

A. Yes.

143 Q. But before you get to that position, the movement is just the same as any shoulder joint?

A. Yes, except it is limited, you cannot put it away ahead, and things of that kind. You can have, though, quite a degree of motion backward and forward.

Q. When it stops the forward movement, is there also a crackling sound, or is there only a crackling sound when you are raising it up?

A. I think it is more when you raise it up.

Q. When it stops going forward or stops going back, it just stops, does it?

A. Yes, sir.

Q. There is no crackling at all?

A. No, I think not.

Q. It is only when you try to pull it up horizontally that it finally crackles?

A. Yes.

Q. I suppose you examined the surface of the shoulder there very carefully to see whether you could not feel something?

A. Yes.

Q. But you couldn't feel anything?

A. Couldn't detect anything.

Q. Now, by the way, just explain to us how this shoulder joint is formed; I suppose most of us know, but perhaps we could be benefited by an explanation.

A. It is a ball-and-socket joint. Which means just the same as it says, a ball and socket. And the movement of the joint has a very extensive motion, capable of practically complete rota-

144 tion. In front of the joint, the end of the clavicle comes down and forms a protection and also for the attachment of muscles.

Q. There is a sort of socket——

A. It is a perfect socket.

Q. A perfect socket?

A. Yes.

Q. And then on the end of the femur——

A. On the end of the collar-bone.

Q. —the humerus, I mean——

A. Yes.

Q. —at the end of the humerus is a kind of a ball?

A. Ball.

Q. And that fits up in there and rolls around with great freedom?
A. Yes, sir.
Q. There is no doubt about this being the humerus, is there?
A. Not a bit.
Q. One of Mr. Peery's doctors called it the femur, too.
A. Yes. (Witness laughs.)
Q. But it is one of the most movable joints in the body, I suppose?
A. Yes, sir.
Q. How do these fellows manage to twist it around so much who gets on the trapeze and keep on going around; does that joint keep on turning around in there?
A. Well, they untwist themselves, they have to do that, they can't keep twisting.
145 Q. No, but they seem to twist around almost twice?
A. They don't.
Q. They don't?
A. No, they come almost once, and then they reverse.
Q. You can't really twist it around one complete revolution?
A. You can make one revolution this way (illustrating) but that is not a complete revolution.

Redirect examination.

By Mr. Anderson:

Q. On account of the anæsthetic proposition. I think it is fair to ask you as to the demeanor and actions of the plaintiff during your various examinations as to whether or not he submitted to your examinations apparently as a frank and honest man?

Mr. Hoke: Well, I will concede that he did.
Mr. Anderson: All right, it is conceded that he did, I don't need to ask the question then.
Mr. Hoke: I think his demeanor in court is good, too. I have no criticism to offer.
Mr. Anderson: I would not ask the question but for your anæsthetic proposition.

Recross-examination.

By Mr. Hoke:

Q. By the way, that suggests to me, do you think an operation might disclose what the condition was, and enable you to remedy it?
A. You could see the inside of the joint by an operation.
146 Q. And might that possibly cure—remove the obstruction?
A. It would be a last resort before you would operate on a big joint like the shoulder joint.
Q. It would be a difficult operation?
A. It would be a difficult operation.

Q. And it would be a most unusual operation, inasmuch as you have never heard of such a case as this before?
A. I think it would be an unusual thing to attempt.

Dr. CHARLES R. BALL, sworn on behalf of plaintiff, testified:

By Mr. Anderson:

Q. Doctor, you live in St. Paul?
A. Since 1891.
Q. You are a practicing physician and surgeon?
A. Yes, sir.
Q. A graduate of what school?
A. University of Minnesota.
Q. Have you also studied abroad?
A. Yes, sir.
Q. And when did you begin the practice of your profession here in St. Paul?
A. I began here on June 1, 1894; it will be twenty years the 1st of June.
Q. And have you since taken up a specialty as we laymen speak of it?
A. Yes, sir, I am a specialist in nervous diseases.
Q. This is for about seven years?
147 A. This is for about seven years. Well, I have been for about eight years. For a period of twelve years I was in general practice.
Q. And not only in your general practice, but particularly in your special practice do you have a good deal to do with the back and neck and that part of the body?
A. Yes, sir.
Q. I believe you made an examination or several examinations of the plaintiff in 1912, previous to the first trial, at my request?
A. Yes, sir.
Q. I think you had the plaintiff under your observation considerable?
A. A number of times, four or five times at least.
Q. If I remember correctly, you were present at each time when the X-ray photographs were taken?
A. Yes.
Q. Assisted in the taking of the same?
A. Yes, I took the X-ray photographs.
Q. Some one assisting you—that was really the way it was?
A. Yes, sir.
Q. In your office here in the Lowry building?
A. Yes, sir.
Q. And while on that subject—you took three X-ray pictures for the purpose of finding out all they would show?
A. Yes, sir.
148 Q. And so far as the X-ray pictures were concerned, I believe you agree with Dr. Davis substantially, that they don't disclose——

A. They were negative, so far as disclosing anything.

Q. Doctor, what examination and character of examinations did you make of the plaintiff?

A. Well, I took his weight and also his height.

Q. I am speaking now of 1912.

A. Oh, 1912. Well, practically the same examination that I made on February 16th. I examined him with reference to his general physical condition first, and his chest with reference to the condition of his lungs and his heart—the condition of that organ; took his pulse, examined his urine; I took his temperature and I also tested his station to decide what his muscular sense was, his sense of balance; I tested his reflexes to determine what the condition of his nervous system was, whether there was any functional nervous trouble existing or whether there was any organic nervous trouble existing; and with reference to those examinations, they were also negative.

Q. That means the same as normal?

A. As normal, yes, sir. Then I stripped him to the waist and observed his back, and particularly the right shoulder, the way he carried himself when he walked around. I noticed when he walked that he carried his back, the upper part of his back very rigid, and also his right shoulder seemed to be—that he carried that rigid, very much as patients do who have pains and try to protect
149 themselves against pain by this rigidity. I noticed the stoop, the deformity in his spinal column.

Q. You have seen many what we commonly speak of as stoop-shouldered men?

A. Yes, sir.

Q. I will ask you to tell us whether the stoop or bend in his back is of that character in shape and contour and location as you generally observe them, or whether it is different.

A. Well, so far as the stoop is concerned, I should say it was quite similar to a very badly stoop-shouldered condition. It differs in this regard, that one that is stoop-shouldered has a freedom of movement, they don't have the rigidity, they don't walk carefully as though they have something sore to protect, but they walk with a freedom and ease of movement, and that is the striking difference between the ordinary stoop-shouldered condition and the condition in Mr. Peery that I observed.

Q. I was wondering whether there was any difference in appearance with reference not only to the contour of the back but the location or position that he carries his head in and his neck—whether there is anything there that attracted your attention.

A. The right shoulder seems to be higher than the left and also seems to extend farther forward.

Q. By the way, what is the normal position generally of working men, as to whether the right shoulder or left shoulder is the higher, if there is any difference, where a man is right-handed? I
150 don't know as there is any difference with workingmen.

A. I think that is a matter of individuality, I don't think there is any definite——

Q. Now, Doctor, taking up the shoulder itself first, tell us in your own way what you found wrong with that shoulder, if anything—in the shoulder and the arm.

A. Well, we observed it was higher and farther forward, he carried it farther forward, and it was also fuller in here. (Pointing.)

Q. Indicating over the clavicle?

A. Over the clavicle and over the chest it is fuller. So far as feel was concerned, by feeling around the joint I could not detect at this location a fracture, but when I tried to raise the shoulder at about an angle of forty-five degrees it didn't have that freedom of movement, it required more effort, there was resistance; and when I got up almost to the horizontal, then there seemed to be a locking.

Q. A what?

A. A locking.

Q. A locking?

A. Yes, sir. And in order to determine that I reached around and put one hand on the shoulder-blade, the edge of the shoulder-blade, and then with a great deal of force I raised the arm up, and I found that instead of this humerus, this arm-bone, rotating in the socket-joint as it should rotate, the whole shoulder—that is, the shoulder-blade as well—rotated, simply by using the force.

151 What I did there was to twist the arm and the scapula, the shoulder-blade, showing that there was an obstruction. I noticed sometimes, particularly in the backward and forward motion—that is, passive motion—taking hold of the arm and moving it backward and forward, with one hand on the top of the shoulder firmly, that there seemed to be a slip in the joint, something slipped. Not every time, but very frequently something slipped.

Q. Was that abnormal?

A. Yes, sir. A distinct sensation through my fingers that were on the shoulder.

Q. Was there any noise or cracking sound in the joint?

A. Yes, sir.

Q. Which motion would produce that?

A. Well, the motion that produced that was the backward and forward motion, with the arm held tightly close to the body.

Q. And was that something that is abnormal?

A. That is something that is abnormal; the motion should be perfectly free there and unaccompanied by either one of those.

Q. What did you find when you manipulated and twisted the arm around in front, and particularly in attempting to put his hand up on top of his head as you saw him doing reaching in front of him.

A. Well, he has a fair degree of motion in front.

Q. In front with his hand, which way?

152 A. By bringing the arm straight out. And his backward motion I think is better, that is, he could put his arm behind his back.

Q. Which motion did he have the freest of any motions he could make with his arms?

A. I think he had the freest backwards.

Q. Putting it back behind his body?

A. Yes, sir, I think it was freest there.

Q. How about the motion in getting his hand up to his face?

A. In getting his hand up to his face, as I observed it in the office, it was just about the same as he demonstrated here yesterday; that is, he gets his hand up here to the side of his face and then kind of crawls up along his face with his fingers to about this poin (indicating) and then if he has to go any higher he has to push it up.

Q. And did you test it yourself so as to satisfy yourself as to whether he could or could not do that voluntarily? I mean did you manipulate his arm in various ways to satisfy yourself.

A. I manipulated his arm, yes. He could not do that voluntarily on account of this locking, its limitation of motion.

Q. Well, in your opinion, from all the times you observed him and examined him, could he take his hand and lay it up on top of the crown of his head?

A. No.

Q. Doctor, what is your opinion with reference to the future of the arm and shoulder?

A. Well, I think it will remain as it is.

153 Q. You have heard the testimony of the plaintiff here, all of it?

A. Yes, sir.

Q. And you realize that this accident referred to occurred in December, 1911, more than two years ago?

A. Yes, sir.

Q. What change for the better, if any, or at all, do you find in his shoulder and arm and ability to manipulate and use it?

A. Well, very little, if any.

Q. You have heard the testimony, and assuming it to be true and keeping in mind your examinations, I will simply ask you the formal question whether or not it is your opinion that the accident brought about those conditions in the shoulder.

A. Yes, sir.

Q. Now, in regard to the back, what is the matter with it? Tell us in your own way,—back and neck.

A. Well, it seems to me that there is a little thickening in the back just between the shoulders at the upper part, at about the first dorsal and seventh cervial vertebræ. I couldn't be sure about that but I thought so both times, last year and this time; that those processes were a little thicker than normal. I have never been able to get any motion by taking his head and trying to test the movability of the vertebral column, I never have been able to get any motion between the vertebræ in the neck.

Q. That is, the seventh cervical and the dorsal?

154 A. They seem to be perfectly rigid.

Q. Is that abnormal?

(No answer.)

Q. That is not a normal condition?

A. Oh, no, it is an abnormal condition.

Q. Well, go on about the back and muscles, anything that is wrong with that.

A. And the whole shoulder, there seems to be an abnormal rigidity in it. He holds it perfectly quiet on all occasions. If he turns around he turns around; every motion he makes, so far as I have observed, he holds the neck and that shoulder in about the same position.

Q. How about the muscles around the back where it is bent and bowed as to being rigid and different from the normal?

A. His muscles seem to be rigid.

Q. What did you observe with reference to the plaintiff, including your last examination the other day, as to whether in making the examination of his back and manipulating he evinced or showed signs of pain and if so where?

A. Well, the other day when I examined him I guess he didn't like it very well, I used a good deal of force.

Q. Would his back bend?

A. Well, chiefly with his shoulder, in trying to force it up as far as I could.

Q. I know about that, but when you manipulated his back and put your hand upon the spinal process——

A. I never was able to observe, under any sort of manipul ation— or I couldn't get motion there.

155 Q. What?

A. Any motion there.

Q. Yes, I know about motion, but how about pain, did he show signs of pain when you were examining his back?

A. Oh, yes.

Q. Doctor, from your observation of the plaintiff and in your various examinations, what is your opinion as to his ability to stand against the wall and bring his head back against the wwall voluntarily?

A. Well, he is not able to do that.

Q. Do you believe, Doctor, that there is any chance for improvement in the condition of the plaintiff as to his back and shoulder and arm in the future?

A. I don't think so. The conditions of pain may grow better.

Q. Doctor, to what extent, in your opinion, will the condition the plaintiff is in, as to his back and shoulder and arms interfere with him and his usefulness as a working man, say in doing such work as climbing up and down box-cars, handling a shovel or a fork, or anything that requires any forward motion of the arm, the right arm, lifting forward and throwing——

A. It would interfere with him very greatly in almost any sort of manual work that I can think of.

Q. Did you examine the clavicle?

A. Yes, sir.

Q. Has there been a fracture there, in your opinion?

156 A. Yes, there was a fracture there.

Q. Good results?

A. Good results, excellent. And there was a depression of the breast-bone. The breast-bone is composed of three parts: there is the manubrium—that is the upper part—the gladiolus and the ensiform cartilage; and it would appear that there is a dislocation of this upper

part of the breast-bone backward. That is, it is depressed. You see, the bone in the beginning, in young, is in two parts, but as one grows older, where the manubrium or upper part articulates with the middle part, it forms a bony union, and here it is dislocated.

Q. What effect does that have upon the contour of the breast-bone below that?

A. It makes a disfigurement, a deformity there.

Q. Just give us the abnormal shape, if any, as compared to the normal.

A. The upper part is depressed. Say this is the upper part here, and it comes out like that. The lower part seems to be in the natural position, but the upper part is depressed backwards.

Q. Doctor, did you measure the plaintiff's height yesterday?

A. Yes, sir.

Q. Or the day before yesterday it was, I guess—yes, night before last.

A. Yes.

Q. You have a pair of scales, I believe, in your office?

A. Yes.

157 Q. Does that have an upright rod, with a fixable right angle projection which is put over the top of the head?

A. Yes, sir.

Q. What was his height in his stocking feet?

A. It was five feet six and one-quarter.

Q. That is accurate?

A. Yes.

Q. Doctor, how would you account for the lessening of his height of two and one-fourth inches, assuming his testimony which you heard, to be true, that his height was five feet eight and one-half inches before this accident?

A. Well, in the deformity in the vertebral column.

Q. Is there anything which occurs in a human being thirty-eight years of age, under normal conditions, to account for a depreciation in the height of two and one-quarter inches?

A. Well, one may, after a period of years, become so stoop-shouldered, I think, that they could lose that entire height; there is a certain shrinkage in a man's height.

Q. That is what I mean, of course—a man, if he keeps on getting stooped over, he will get shorter; but I mean what is the normal lessening of the height of a man ordinarily, say?

A. I am not certain; I think it is something like from half an inch to an inch.

Q. And when does that take place, what period in life, generally?

A. It takes places from the thirties up.

158 Q. Is that a quick lessening or a gradual process?

A. It is a gradual process.

Q. Is there anything, Doctor, that you discovered in connection with the outline of his back and the position or shape of the sternum in your general examination that would lead you to any conclusion as to what happened to the plaintiff at the time of the accident, assuming, as we do, that the accident caused these condi-

tions? What I mean is, is there anything in the shape of the man, the way he carries himself, that indicates to you anything as to how the blow took him and what effect it had on him there?

A. No, I don't think there is; I couldn't tell.

Q. I don't know as I asked you the question—We have been talking about the back, the bowed condition and two and one-quarter inches lessening in height—deformity of the sternum. I will ask you, assuming all the testimony you have heard from the plaintiff to be true, and taking your examination into consideration, whether this accident that was described would account for those conditions.

A. Yes.

Cross-examination.

By Mr. Hoke:

Q. Dr. Ball, in forming your opinions in this matter, you rely very largely upon the truthfulness and accuracy of Mr. Peery's statements as to his subjective symptoms.

159 A. I wouldn't say very largely, I would say to a certain extent.

Q. Of course, so far as the back is concerned, you rely absolutely on his statement that he was a straight man before the accident?

A. Yes, that he had no deformity.

Q. That he had no deformity before the accident?

A. Yes.

Q. So, insofar as the back is concerned, you rely absolutely on his statement that he was all right before?

A. No, not with reference to this rigidity nor to the apparent thickening there—there seems to be a thickening.

Q. I know, but that apparent thickening is a pretty hazy sort of thing, isn't it, in this case?

A. Well, I couldn't see through it.

Q. I say it is rather indefinite, it is rather conjectural.

A. Well, I couldn't be sure about the thickening, but I thought so both times.

Q. Just an impression that you have?

A. Well, it is a feel.

Q. I thought it was something in the pictures.

A. No.

Q. Oh, just a matter of feel?

A. Yes.

Q. You say that the stoop of the back is similar to the so-called occupational stoop?

A. Yes, I think it is; very similar to one that you would

160 say had a marked degree of stoop-shoulder.

Q. And the way you distinguish that is by observing the tenseness of his muscles, is that it, or didn't you distinguish it that way?

A. Well, they distinguish it by observing the rigidity of the neck and the shoulder. I said that while the ordinary stoop-shouldered

individual has freedom of movement, with regard to Mr. Peery, he carried the neck and shoulder with a degree of rigidity, and that is the striking distinction between his condition and the stoop-shouldered condition due to occupation.

Q. Of course, his left shoulder is not stiff usually?

A. No.

Q. Does he carry that stiff, too?

A. No, that is not stiff, that is all right.

Q. Well then, the only stiffening of the shoulder is the stiffening of the right shoulder?

A. Yes, and a stiffening of the vertebræ, too, at this point.

Q. Up at the point of connection?

A. Well, from the top of the shoulder here up to his head. As far as his head is concerned, it rotates well on the top vertebræ; that has freedom of movement there—very free, but don't bend backward or sidewise from the head down to between the shoulders.

Q. Aside from the question of stiffness and the question of pain, the mere position of the bones as you observed them, would
161 not in itself cause any disability?

A. What bones?

Q. Well, of the back, I meant to say, of his back-bone.

A. No, there is no dislocation of his vertebræ at all, they are in perfect position so far as I can determine.

Q. Yes, and so far as his back-bone itself is concerned—that is to say, the position of them—he may very well be athletic and capable of performing any sort of labor? That is, leaving out the question of pain and rigidity of muscles, but I mean just the position of the bones themselves.

A. Yes, so far as the position of the bones is concerned, he would still have a deformity.

Q. Yes, he would still be round-backed?

A. Yes.

Q. As a good many men are who work regularly—as I believe I am myself; I don't know whether I could be classified as a man who works regularly or not.

A. I think when one has that deformity, whether it is due to accident, disease or to habit, it is very hard to overcome; that has been my experience. After it has existed for a number of years you can't very well straighten a man up.

Q. You can't wear shoulder braces or anything of that sort?

A. They don't accomplish anything.

Q. Now, with respect to the position of the breast-bone, you say that it is depressed?

162 A. Yes, the upper part.

Q. Dr. Davis said it was sticking out, didn't he?

A. Well, I guess he referred to the lower part; I am referring to the upper part.

Q. You said the lower part was normal?

A. Yes, but it gives that appearance of bulging out, because the top is depressed.

Q. Then you were talking about different bones, probably?

A. Well, it may seem so. I don't think there was any lack of harmony between what Dr. Davis said and what I said. He said the lower part was sticking out—that is his point of view in looking at it.

Q. You say the upper part is sticking in?

A. Yes, the upper part is depressed.

Q. He said you got this crackling sound when you raised the arm up horizontally, but you said that you got it when you swung the arm back and forth?

A. Yes, I got the slip both times—best when I had this motion. (Illustrating.) I think if you will look at my testimony a year ago you will find that is what I said.

Q. So that there is a difference, then, in observation between you and Dr. Davis now with respect to the particular movement which discloses this crackling sound, is there not?

A. I don't think so.

Q. You followed Dr. Davis' testimony closely, didn't you?

A. I did, yes.

163 Q. You passed up questions to Mr. Story to ask Dr. Davis, didn't you?

A. I suggested some questions.

Q. Well, what I mean by that is you were following it very closely.

A. I was following it very closely, yes.

Q. Now, may I fairly say that there is that difference between your testimony and Dr. Davis' as to the movement that discloses this crackling sound?

A. No, I don't think so. I don't say that there wasn't any crackling sound when I moved his arm up this way, or that there wasn't any slipping. I said that I got it best when I manipulated his arm back and forth. Now, perhaps Dr. Davis may have gotten it the other way. I don't say that it wasn't gotten the other way.

Q. I didn't remember you said you got it best when you got it that way, I thought you said that was the way you got it.

A. I said I got it best with his arm. I don't think there was any difference, we practically agreed, in the examination.

Q. Is that crackling sound a very noticeable, unmistakable thing, or is it something that you have to watch for very closely? For instance, if we should take his arm and bring it here and let the jury put their hands on his shoulder, would that be something they could readily notice?

A. They could notice it, yes.

Q. They could notice it?

A. They could notice it.

164 Q. And could they possibly hear it? Be something like pulling your finger out of joint here?

A. Yes.

Q. Something like that? I never like to do that.

A. Yes, something like that.

Q. Some people can do that?

A. You get the slip and the sound with your finger. Of course, your sense of feel helps.

Q. In having your hand——

A. On the top of the shoulder.

Q. On the top of the shoulder you get sort of a warning through the sense of feeling that the slip is going to occur?

A. No, no, when it does occur.

Q. In other words, you are using two senses?

A. You are using two senses, just the same as if you are looking for a fracture, to see whether a bone is broken.

Q. How could that slip in there cause a stiffness of the shoulder?

A. Well, it shows that there is some abnormal condition in there; whether it is with the ligament that holds the shoulder-bone to the joint or whether it is a thickening in the cartilage or a loose cartilage, yet it does.

Q. I was wondering whether you could sort of give us a definite idea of just how that came about in relation to this ball-and-socket joint; where does it slip, what is your idea of where it slips through—my wrist cracked that time when I twisted it around.

165 A. Well, it slips in the joint, I don't know just where it slips.

Q. How is that slipping going to stiffen the shoulder? Just what is your idea about that, or what does that slipping represent?

A. Well, that is very easy to understand, if you have a medical knowledge of those joints. You see, although this is a ball-and-socket joint and has the greatest freedom of motion of any joint in the body, yet a very slight dislocation, a very slight thickening in the joint, a very slight malposition of the ligament, interferes greatly with the motion—it doesn't take much to spoil the movement of that joint.

Q. Well now then, on the end of the radius there, is this ball, and it fits into kind of a socket that extends down over the end of the ball?

A. You don't mean the radius, I guess, do you?

Q. Well, I don't know what I do mean, but whatever bone it is up here in the arm.

A. Well, this is the humerus.

Q. Yes—I called it the femur and the radius. I mean the humerus now, this bone in the arm. Now, on the end of that is a ball.

A. Yes, sir.

Q. And the socket fits down over the ball?

A. But not completely. It is about a half a ball, about a half a globe, and that socket—well, it is about that shape (illustrating) it is not exactly round, it is something like this, and the depression is not very great in there, either.

Q. Not very great?

166 A. Not very great. It is not like the hip joint, there is quite a depression in the hip joint, quite a cavity.

Q. How much joint surface is there on the end of this ball?

A. Well, the whole ball is joint surface; that is, it is half of a ball—the whole half.

Q. That is, at any one time only half of it is riding there or in contact, is that it?

A. No, that is not correct, there isn't but a half. Now, here, suppose my finger there is articulating in that joint; the top of that surface is an articulation now, but if I rotate it up, then don't you see that side comes off; roll it down, then that side comes off, roll it this side, then the other side—you see it is a perfectly round surface.

Q. Well, suppose there is some little thing sticking up on the ball, that would move, of course, when you move the arm this way, and pull out this way, wouldn't it?

A. Yes.

Q. In other words, all portions of that ball——

A. Moves.

Q. —moves at all times?

A. At all times, yes, sir.

Q. So that if there was some little lock there, wouldn't it lock all the time?

(No answer.)

Q. Some little obstruction sticking up on the end of the ball——

A. Yes.

Q. —unless there was some little runway for it?

167 A. No, that would depend where it was.

Q. In the socket.

A. Let me just illustrate that, if I may.

Q. Yes.

A. (Drawing a diagram.) Now we will take this for the joint, here—see? Using your illustration: I don't have any idea that the disease is on this ball—I don't know, that would be assuming that it was——

Q. Well, where have you been assuming it was—in the socket?

A. That it was in the socket some place. If we had something sticking up here, you can readily see that as long as this surface was in contact with the joint that it would rotate very well until you got up over where this abnormal process is, then you would get a locking, wouldn't you? You would get some interference when you roll that over.

Q. Not if it was in the socket?

A. The socket has very little depth to it.

Q. But you think it is in the socket, do you?

A. And only the part is in contact, all the rest of the part of that bone is out of the socket, only the part that is rotating, all the rest is outside of that socket, and only rotates in that socket as you would move the arm up or down or to the side. It is not in the socket that comes around the ball and encloses it like this.

Q. I think I understand that it is more like a cup.

A. Well, it is more like, for instance, like this: Suppose

168 that was the socket, don't you see, and here is the—well, my fist is rotating in there; these knuckles would not come in contact with the socket until I come up here with them.

Q. No, that is right. Just hold your hands there. Now where do you think the obstruction is?

A. I don't know.

Q. Was it in the socket or on the ball?

A. I couldn't tell you where it was.

Q. I thought you told me you felt pretty sure it was not on the ball.

A. Well, I don't believe it is, no.

Q. Your idea is that it is in the socket?

A. Yes, but it may be, you see——

Q. Now, following out your idea, how does it happen that with the obstruction only in the socket it doesn't lock right away instead of waiting to lock until you get around to a certain position? That is what I can't see.

A. Well, you don't rotate just one part of that socket. You have got a large surface there for your rotation, haven't you? I come into the socket here with part of my fingers, I rotate all right there, I don't strike anything if the disease is up here in the socket until I get up to here rotating, at the upper part of the socket.

Q. Oh, I see. In other words, the bone is not touching all of the surface of the socket all the time?

A. It doesn't come down in like the hip joint. The hip
169 joint comes down in like this, you see, so that the ball of the femur is right down in this cavity in the hip, but with the glenoid cavity it is more in this shape, it is a very small depression, it is simply an articular-rotary surface, that is what it is.

Q. What would cause this little lock or spur to come out of there in the joint?

A. Well, I don't know what causes it. I don't know what causes that; that is what we tried to find.

Q. Well then, this case is very unique, is it not?

A. No, it is not unique, we find constantly trouble with joints in the manipulation of them and stiffness in them that we can't account for, we can't find out what the trouble is; so much so that we will take, for instance, in a dislocation of this joint here, particularly if it has existed for a couple of weeks, and then we try to put it back, we may get it back partially—really so the X-ray shows that the thing is all right—but the motion is not all right. I have such a case in mind now, where a man was sent to me for neuritis to be treated, and he had the history of an injury on his shoulder—I think he had dislocation of the joint, that had been existing about six weeks. I took an X-ray and it showed this more or less on his shoulder. I then turned him over to the surgeon. The surgeon put him under an anaesthetic and tried to reduce this dislocation, which he did to a great degree so that the X-ray pictures looked good, but the motion, while it was much better than it had been and the pressure had let up on these nerves here, yet it was limited,
170 it was a poor arm. Then the question came, should the surgeon open it up to try and get the motion better, but that was a delicate thing to do, and after talking and thinking it over, we decided to let well enough alone.

Q. Well, this fellow's arm had been out of place——

A. For six weeks. I just use that illustration to show you that a very little displacement or very little difficulty in that joint there limits the motion and we don't know always how to account for it.

Q. Well, with that length of time there would be quite an interference with the surfaces of the joint, would there not?

A. Well, not necessarily, it would be more with the ligaments, it would be hard to get it back.

Q. What is your idea of the character of this obstruction on the socket of the joint?

A. Well, it must be of bony character because it locks.

Q. Certainly by this time it is bony.

A. It must be of a bony character.

Q. And the X-ray picture ought to show it?

A. No, not necessarily.

Q. Why not?

A. Well, there are quite a few reasons why not. I guess, as I said at first, a little rim of bone on one side you couldn't recognize in the X-ray picture; you can't recognize the depth of that cavity in an X-ray picture. You can see the outlines appear, but you can't tell what the depth of the cavity is, and you can't tell
171 whether it comes forward so as to fill up in there or whether it is hollow, as it ought to be, and in taking an X-ray picture the size of the cavity depends upon the distance your plate is from the X-ray tube, so very many times—I will just say this: An X-ray picture that shows nothing is negative. We don't count negative things for very much, it is only when we get a positive. In all medical examinations if you don't find anything we don't assume that there isn't anything.

Q. No, but if, on the other hand, you don't find anything and you saw this man climbing up the side of a car and putting his arm up over his head, and then Mr. Anderson brought him around to you later and you went through this usual examination, why, you would think that these X-ray pictures were of considerable consequence, wouldn't you, as bearing upon the question whether he could raise his arm?

A. Well, I would immediately grab his arm and try this business here: if I found that lump just the same, I would make up my mind—I would know there was something there, because I can feel that, because that is positive and definite; but what causes it, I don't know.

Q. Now, here is the situation as I understand it: You testified at the last trial, a year ago, did you not?

A. Yes, I did.

Q. And you heard three doctors in behalf of the defendant testify that they couldn't find anything wrong with it?

172 A. I didn't hear their testimony, as I remember, but I understood that they——

Q. You knew that there was a very substantial controversy among

reputable physicians here as to whether or not this man could raise his arm?

A. I remember this: I was surprised at the testimony, because in talking with those doctors beforehand I thought we had substantially agreed about the shoulder.

Q. I wish you hadn't thrown that in, because I didn't ask you to say whether those men were telling the truth, but you knew that there was a substantial controversy, didn't you, about the question whether this man can raise his hand?

A. When they testified on the stand I realized that there must have been; I didn't know it before.

Q. Do you mean to suggest that those doctors said something beforehand and then testified differently on the stand?

A. Well, they gave me a wrong impression. They may have changed from me afterwards, but so far as my impression was in talking with them over the examination, that they admitted the condition of the shoulder.

Q. Well now, Doctor, you quite frequently testify for Mr. Anderson to the effect that men have bent backs, etc., when other doctors say they haven't?

A. Well, I have been practicing twenty years here, and I think this is the third time I have testified in my life.

Q. Isn't there a man back here in the room now—well, he's gone.

173 Mr. Anderson: The third time, Doctor, in cases of my own, you mean?

Witness: Yes. That is in twenty years.

Q. That is all right, if it was fifty times, but I simply mention it to see whether you have a little leaning toward that side of the case—which is a perfectly proper matter to refer to, done in any disrespectful way.

A. No, simply have been here. If you called me, I would testify for you just the same as for Mr. Anderson, if I thought it was part of my business. So long as I have been in the practice, I have never shirked anything that came along the line of business if I thought it belonged to my line and was a legitimate thing.

Q. I wouldn't want to have you get the impression that I am being disrespectful to you, because I couldn't afford to do that, these gentlemen of the jury wouldn't be pleased at all if I did, and I don't want to give that impression, but I wanted to show, if possible, that you might have some bias. Now I will ask you a question——

A. Let's bring out the whole truth in regard to this matter, that is what the trial is for, I guess——

Q. Yes.

A. I have testified a good many times for the plaintiff in these cases, and I have tried to analyze and find out why that was. It seems this way: There are a certain number of doctors here in the city who testify altogether for the defendant, consequently the

other general practitioners in the city know that, and now
174 and then, when an accident comes, they are more apt to call me in consultation than they are these other men, because they feel that there is that little feeling you spoke of just now that may be existing, I think that is the reason.

Q. There is bias, then, on the part of doctors just the same as there is on the part of lawyers—yes. Now, there is a way, is there not, of absolutely determining, beyond any doubt at all, even as between doctors, whether this joint does lock when it gets up to a certain position?

A. Yes—I have determined that.

Q. I know, but I say there is a way of doing it beyond the point where any doctors could disagree about it, isn't there?

A. Why, certainly; I can do that now.

Q. But what I mean is, if you put this man under—gave him a little laughing gas or chloroform, or possibly a local anesthetic, why, then you doctors could get together and forget all about a lawsuit and try to determine that one question, and you could determine it so definitely that no doctors could disagree about it—isn't that right?

A. Why, I wouldn't say that, no, I wouldn't go that far. I will say this: there are instances where we can determine under an anesthetic the freedom of motion of a joint better than we can when the patient is awake, but in this instance we don't need an anesthetic to determine that that joint locks at a certain point—and what is the use of giving it?

175 Q. On the other hand, our doctors say that it doesn't lock. They are reputable men, aren't they?

A. They are reputable men, yes, sir.

Q. Couldn't you, if you put this man under an ane-thetic, absolutely determine, so that even our men wouldn't be in doubt about the question whether this man can raise his arm?

A. I think we ought to determine that, and I think we could determine it, just as well without the anesthetic—to my mind. I will state this, that while the joint locks I also looked at the muscles and felt the muscles that held this joint, and they were perfectly flaccid. To use an illustration, if I am raising up a pole that has got guy-ropes hitched to it on all three sides, and I find there is some obstruction to my raising up that pole, and I look at those guy-ropes and find that they are perfectly loose, with slack, I know then that the guy-ropes are not causing that obstruction, don't I?

Q. Yes, but then some other doctor says they are tense, and then we have a chance for doctors to disagree on that; but if you were to put a man under an anesthetic, they can't disagree, can they?

A. Yes, we can disagree then.

Q. Well, then we won't do it.

A. I didn't hear your doctor's testimony, and I don't know what they testified to except as I was told.

Q. Mr. Peery is in pretty good health, is he?

A. His general health, I think, is good.

Q. No neurasthenia?

A. I didn't find any evidence of it.

176 Q. And if he could only get over these pains and get his arm lifted up a little bit, he would be in good shape to go to work?

A. If he could straighten up his back as straight as he was before and had freedom of movement and of motions in this joint without pain, he would be all right.

Q. Can you help him to get rid of that pain, or can some osteopath give him some kind of relief, or do all the doctors now throw up their hands and say, "Nothing to do." What is the situation in that regard?

A. Well, I think that there is no situation that can't be helped by trying.

Q. And do you think his condition can be improved?

A. I should say that massaging those muscles there around the shoulder, gradually would at least improve the pain and the rigidity in the muscles.

Q. What does the pain come from?

A. Well, it comes from—(pause) it comes from pressure—I have not analyzed that.

Q. He certainly doesn't need a tonic.

A. He doesn't need a tonic, no.

Q. But he needs some kind of massaging?

A. I think a gradual massage there would limber up his muscles and would improve the circulation around the joint. I don't think the circulation is very good around that joint.

Q. There is no apparent atrophy there?

177 A. There is no apparent atrophy. Of course, there is some atrophy from disuse, but that is filled in with fat so there is no loss of contour.

Q. If Mr. Peery were suffering from much pain he wouldn't be getting fat, would he?

A. No, if he had very much pain I don't think he would increase in weight—when he was quiet. He might have pain on movement, and that would not interfere with his weight, but if he had pain that disturbed his sleep and his digestion he would not increase in weight.

Redirect examination.

By Mr. Anderson:

Q. How much did he weigh*t* day before yesterday?

A. 192.

Q. Do you remember what he weighed before the last trial when you examined him?

A. I don't remember that, no, sir.

Recess until 2 P. M.

CHARLES HURLEY, sworn on behalf of plaintiff, testified:

By Mr. Anderson:

Q. Where do you live, Mr. Hurley?
A. Minneapolis.
Q. How long have you lived in Minneapolis?
A. Since August.
Q. Where was your home prior to that?
A. Paducah, Kentucky, up until May 1st.
Q. Up until May 1, 1913?
A. Along some time in May, yes.
178 Q. How old are you?
A. Twenty-four years old.
Q. Did you know Mr. Peery when you lived in Paducah?
A. Yes, sir.
Q. How long have you known him?
A. Well, between nine and ten years.
Q. You knew about the fact that he had met with an accident?
A. Yes, sir.
Q. Some two years ago?
A. Yes, sir.
Q. Where were you living in Paducah with reference to Mr. Peery's home at that time?
A. At the time of this accident?
Q. Yes.
A. I was living within one square of him.
Q. And during the eight years how close to his home had you lived?
A. Well, I lived next door to him, and the second door of him, and never lived farther than one square away from him.
Q. Had you known him intimately during the eight years?
A. Yes.
Q. See him very frequently?
A. Yes, sir.
Q. I wish you would tell this Court and jury what you know in regard to Mr. Peery's physical appearance, particularly as to whether he was a stooped man or erect man.
A. He was an erect man.
179 Q. And do you see any material difference now in his physical shape? and particularly as to his back——
A. Altogether different.
Q. Than it was before the accident?
A. Altogether, yes, sir.
Q. You know nothing about the accident, of course?
A. No, sir.

Cross-examination.

By Mr. Hoke:

Q. What work did you do in Paducah?
A. I worked in a grocery most of the time.

Q. What was your father's business?
A. Why, he worked in a basket factory.
Q. Are you related to Mr. Perry?
A. No, sir.
Q. Your families, however, were on very intimate, friendly terms, were they not?
A. Well, just like all neighbors, yes, sir.
Q. You didn't testify at the last trial?
A. No, sir.
Q. You were in Kentucky then?
A. Yes.
Q. How do you happen to be here at this time?
A. Why, Mr. Anderson asked me if I would come over and testify.
Q. Didn't your mother write to you about it?
A. Yes, sir; that is, she said if Mr. Peery was in St. Paul.
Q. You say he was erect before the accident?
180 A. Yes, sir.
Q. Do you mean by that that he was a man who walked conspicuously erect?
A. Well——
Q. I mean, was he a man who had what we call a military carriage? (Illustrating by walking across the floor.) One of those fellows who walks along, chest thrown out and back flat?
A. He walked straight, yes, sir.
Q. Well, I know, but noticeably straight?
A. Well, there wasn't no noticeable stoop to him.
Q. I say was he rather straighter than most men?
A. I don't know as he was straighter than most men, but he was straighter than some men I know of.
Q. Just an average looking man.
A. A straight-shouldered man.
Q. Big stomach?
A. I don't know as his stomach was any larger than any other portion of his body.
Q. I mean was he a man who had a noticeably large stomach?
A. He was large all over.
Q. Just a big, round, plump sort of man?
A. Yes, sir.
Q. Would you say he walked as straight as I am walking now (illustrating) was he that straight?
A. I think he was.
Q. He was that straight?
181 A. I think so.
Q. Kind of a spry walker, a fellow that threw out his chest and walked briskly?
A. Yes, sir.
Q. A lively sort of fellow?
A. Yes, sir.
Q. Carried his head erect?
A. I think so, yes, sir.

Q. He didn't walk along in sort of a Bob Fitzsimmons type of man?
A. I am not acquainted with Bob Fitzsimmons.
Q. Have you ever heard of Bob Fitzsimmons down there?
A. No, sir.
Q. You have never seen Bob or seen pictures of him?
A. I have seen pictures of him where he was boxing and such as that.
Q. Yes, but never noticed his particular type or build?
A. No, sir.
Q. Did Mr. Peery bend his knees as he walked? For instance, the way I walk—maybe this is a little exaggerated—as though stepping over a furrow?
A. I don't know.
Q. Didn't notice that?
A. No, sir.
Q. And did you notice whether he sort of toed in?
A. Pigeon-toed?

Q. Sort of slough foot, as they call it, or wearing out the
182 inside of his shoes.

A. No, sir, I never paid enough attention to his shoes.
Q. You never noticed it?
A. Not that I remember of, no.
Q. You would say that he is about an average in that respect?
A. Yes, sir.
Q. But, in order to get the full effect of your testimony, I understand it to be that Mr. Peery was a man who walked head up and shoulders up and spry (illustrating). This is the sort of fellow (illustrating by walking).
A. Well, I think he was, yes.

ATHOL PEERY, sworn on behalf of plaintiff, testified:

By Mr. Anderson:

Q. Athol, you are the son of Mr. Perry, the plaintiff in this case?
A. Yes, sir.
Q. You live down in Paducah?
A. Yes, sir.
Q. You have lived with your father, all your life?
A. Yes, sir.
Q. How old are you?
A. 15.
Q. When will you be 16?
A. The 3rd day of September.

Q. What was your father's appearance? And tell this
183 jury just as accurately as you can—what was his appearance as he walked along in every day life as to his shoulders and his back?

A. His shoulders, and back was straight and he was not bent over like it is now.

Q. Does he look very much different to you now from what he did before this accident occurred?
A. Yes, sir.

Cross-examination.

By Mr. Hoke:

Q. You know Robertson, don't you?
A. Yes, sir.
Q. He has lived near there, too, hasn't he, for some years?
A. Well, he has been living there about two or three years, somewhere along there.
Q. Now would you say that Robertson is a man who walks straight, shoulders straight and head up?
A. Why, yes, sir, Mr. Robertson walks very straight.
Q. Was your father as straight and as flat backed as Mr. Robertson is?
A. Why, yes, sir, he was as straight.
Q. And walked with his head up in the air?
A. Yes, sir.
Q. Now, have you noticed that your father is any crookeder since he got to St. Paul here?
A. Well, no, sir, he just looks to me just like he did at home.
Q. Just the same?
A. Yes, sir.
184 Q. Was he that way when you were unloading coal?
A. When I was unloading coal?
Q. Or when he was, too.
A. He was not unloading it.
Q. He has been that way when he was taking care of the store there?
A. Yes, sir.
Q. Handling bales of hay, or didn't he ever do that?
A. Well, he was with me, handled them occasionally, walking along.
Q. And was he just as stiff as he is now, when he would stoop down to pick up a bag, or something like that?
A. Yes, sir, he couldn't stoop down, he had to go down gradually, not right straight down.
Q. Bend his knees instead of bending his back?
A. Yes, sir.

GIRD ROBERTSON, sworn on behalf of plaintiff, testified:

By Mr. Anderson:

Q. Mr. Robertson, you live in Paducah, Kentucky?
A. I do.
Q. You are still, I take it, in the employ of the Illinois Central?
A. Yes, sir.

Q. And you have been brought here by the defendant as a witness?

A. I have.

185 Q. As I remember it, at the former trial you were not here, but your deposition was taken before. Do you remember that?

A. Yes, sir.

Q. You were the engineer on second 180, the train that has been referred to in this case?

A. Yes, sir.

Q. And had you been in the employ of the Illinois Central as a locomotive engineer for some considerable time before this accident happened?

A. Yes, sir.

Q. You were quite familiar with the track and surroundings, and right of way between Paducah and Fulton, I take it?

A. I was.

Q. Your conductor on this occasion was Mr. Gorman?

A. Yes, sir.

Q. Mr. J. W. Gorman?

A. Gorman—I don't know his initials.

Q. James W. Gorman, I believe?

A. That is it.

Q. Now, I am going to get right down to the time of your leaving Fulton. When you were getting ready to leave Fulton as engineer, with Gorman in charge of the train as conductor, you, as engineer, received the usual order controlling the running of your train out of Fulton north?

A. Yes, sir.

Q. And perhaps we can shorten it—you have heard the order read here in the course of the trial—number 87?

186 A. I think so.

Q. And the order I refer to would be addressed and was directed to the engineer and conductor both—that is the practice anyway?

A. That is the practice.

Q. And that order as it was read here—I will read it and see if you will remember it. In substance—"Engineer 876"—it is blurred here, is that the right number?

A. That is right.

Q. "—876 and 367 coupled and 1603 run as first and second number 180 Fulton to Paducah yard. First number 180 must not exceed a speed of 15 miles per hour." Signed by Peery and Gorman. You got that order?

A. Yes, sir.

Q. And is that the order under which you ran your train at all times up to the time of the collision?

A. That was the order.

Q. That was the order, so you received no change of orders, at Mayfield or any other place?

A. No, sir.

Q. Then, so far as you were concerned, I take it, you had no information from any source of any change of orders so far as Peery was concerned?

A. No, sir.

Q. What did that limitation—not to exceed 15 miles an hour in that order mean to you as engineer of second 180?

A. It was instructing me what he was to run at.

187 Q. And then you knew at all times that he was not—that is, from your knowledge that was given to you—that at no time was he to exceed a speed of 15 miles an hour?

A. That is right.

Q. Is that right?

A. That is right.

Q. And what speed were you authorized to run your train at?

A. There wasn't any speed put on me only the speed that was put on the class of engine.

Q. Well, of course, you at all times were to follow first 180?

A. Yes, I was to follow him.

Q. Well, then, you could not, could you, under that order, exceed the 15-mile limit?

A. Oh yes, there wasn't any limit on me, it was on the other train.

Q. Well, would it mean nothing to you, as to your speed?

A. Only instructing me what he has to run at.

Q. Were you authorized under the order as it read, to run your train at any greater speed than 15 miles an hour?

A. No, sir, we were not authorized in any order that is put out what speed we ought to know when we start out what speed we are running.

Q. What space were you as engineer, required, in time, to keep back and away from the first 180?

A. Ten minutes.

Q. It was your engine that ran into Mr. Peery's caboose?

188 A. Yes, sir.

Q. Now, you would be upon the east side of your engine as engineer?

A. Yes, sir.

Q. The right hand or east side running north; and you had a fireman who when not shoveling coal would be on the left hand side of the engine?

A. Yes, sir.

Q. I take it that when the fireman was not busy shoveling coal, he would spend his time in his seat, occupying a lookout on his side of the train?

A. Yes, sir.

Q. What speed were you running your engine and train at when you struck Mr. Peery's caboose?

A. I was running about 18 miles, I guess, when I hit the caboose. 15 or 18, something like that.

Q. At what speed were you running when you yourself, first discovered the tail lights on the caboose?

A. Something like 25 or 30 miles an hour.
Q. Why were you running 25 or 30 miles an hour?
A. Well, our speed limit was only 30 miles an hour. I could go up to that.
Q. Why were you exceeding 15 miles an hour?
A. Because I didn't have any reason to not exceed that.
Q. Why not, when you knew that number 180, first, was ahead of you and limited to 15 miles an hour?
A. I didn't know where he was.
Q. Wasn't it your business to know?
189 A. No, sir, I was running my train, not his.
Q. Was it your business to keep back from his train 10 minutes in speed?
A. It is, when I know it.
Q. What is that?
A. It is, when I know it.
Q. When you know what?
A. Know that I am 10 minutes behind him.
Q. Whose business was it to know whether you were 10 minutes behind or not?
A. They have places to space you, 10 minutes behind, and when I haven't that, I don't know.
Q. And when you have no operator or train dispatcher at stations that you are passing through to give you information as to whether the space is 10 minutes, what were you required to do, as engineer in charge of your engine?
A. Still proceed.
Q. 25 or 30 miles an hour?
A. Yes, sir.
Q. Any speed you please?
A. No, sir, I didn't say that.
Q. What duty did you have to perform with reference to keeping a lookout and not run into first 180?
A. Always look out.
Q. It was your duty not to run into 180, wasn't it?
A. It was my duty to look ahead.
Q. And was it your duty or was it not your duty to run your engine at such speed and under such control that you could avoid a collision?
190 A. (Pause.) Why, yes, so far as seeing is concerned.
Q. State whether or not it was not your duty as engineer to run your train on this occasion so as to avoid a collision with any train in front of it?
A. No, sir, I don't see it that way.
Q. Well, then, what did the limitation of the speed to 15 miles an hour on first 180 mean to you?
A. It meant to take extra precaution, notifying me the rate he was running at.
Q. Who notified you?
A. The order—the dispatcher.

Q. Oh, yes, that is, the order, notified you that he was not exceeding 15 miles an hour?

A. Yes, sir.

Q. Well then before you saw his lights, you were running practically twice as fast as you had any reason to believe he would be running, nearly twice as fast, weren't you?

A. That is true.

Q. And you were running along and over a reverse curve, just before you reached and struck the caboose, I believe?

A. Yes, sir.

Q. What about the contour of the track, and the surroundings, as to your ability to see ahead and see whether or not you were overtaking Peery's train? While you were on this curve?

A. The curve obstructed from seeing around it.

Q. How far ahead of your engine were you able to see along the track so as to observe tail lights while you were on this reverse curve?

191 A. Something like 8 or 10 car lengths, I think.

Q. In what distance were you able to stop this train on this curve at the speed that you were actually running at?

A. Oh, something like 30 or 35 cars, I guess, maybe 40.

Q. You had air brakes?

A. Yes, sir.

Q. In good order?

A. Yes, sir.

Q. Had them in operation on all your train?

A. I did.

Q. So planned, constructed and arranged that by an instantaneous move of your hand you could move a little lever on your engine, and thereby cause the brakes to set in emergency throughout your entire train with great quickness, couldn't you? Is that right?

A. That is right.

Q. And your train was made up of the locomotive and about 53 cars when this collision occurred?

A. That is right.

Q. All empties?

A. Two loads in it.

Q. Where were the loads?

A. Next to the caboose.

Q. Brakes act best on which class of cars, loaded or empty?

A. Empty.

Q. And, of course, your brakes are constructed so as to

192 apply almost instantaneously on your engine?

A. Yes, sir.

Q. Not only on the drive wheels, but on all 8 wheels of your tender, is that right?

A. Yes, sir.

Q. And the pressure that you could get on your wheels and with the air brakes you then had, and in the condition they were, when thrown on in emergency, would be how much to the square inch?

A. 50 pounds.

Q. Do you happen to know how much the surface was for each brake on each wheel, how many square inches?

A. No, I do not.

Q. But the pressure, of course, is very great, isn't it, when you throw them on in emergency,—is that right?

A. That is right.

Q. The throwing on in emergency on this occasion, locked your drive wheels and made them slide?

A. It did.

Q. Almost instantly?

A. No, sir, some little bit—a few seconds.

Q. In other words it would not lock them until your speed had come down and been reduced very considerably below 30 miles an hour, would it?

A. Oh, it was something lower than that.

193 Q. You can't lock your wheels under ordinary conditions, then, even in emergency, when you are running at a high speed, can you—the brakes won't lock?

A. It is some harder to lock them.

Q. But if you are running along ten or fifteen miles an hour, the brakes will then lock your wheels on your engine, and on the cars also, and make them slide, is that true?

A. Well, in some cases.

Q. Well, ordinarily, I mean.

A. Well, yes, but they have an apparatus provided to prevent sliding on the cars, some now, they have a reducer draws the pressure down so they won't slide.

Q. You didn't have those appliances on any of this train, I take it.

A. Well, I didn't examine the train myself, I don't know.

Q. At any rate you know of none on this train?

A. I don't know of any, no.

Q. Did you remain on your engine?

A. I did.

Q. So you knew when the crash came, of course?

A. I did.

Q. How far did your engine run, in your best judgment, after you struck the caboose?

A. Oh, something near 10 cars, I guess.

Q. That would be in the neighborhood of 400 feet?

A. About 36 feet to the car, I believe.

194 Q. Did you examine the conditions after the accident, so as to be able to tell where the caboose was?

A. Yes, sir.

Q. Where did you find the first fragments or remains, of the caboose, south of your engine—where was it?

A. Something like between eight and ten car lengths.

Q. That is, as you went back along your train after you stopped, you found pieces of the caboose back eight or ten car lengths south of your engine, didn't you?

A. South of my engine.

Q. Where did you find the frame work of the caboose after you had gotten your train to a stop?
A. Most of it was up in front of the engine.
Q. You backed your train away didn't you, afterwards, went south with it?
A. No, sir, I didn't; someone came and pulled it off of me.
Q. Someone from the south?
A. Yes, sir.
Q. Did you go with it?
A. No, sir, I taken the engine and some three or four cars back to Boaz; that is all I carried.
Q. Where did the rest of your cars go?
A. They went back to Boaz.
Q. You mean somebody took a large portion of your train back to Boaz and then you backed your engine with three or four or five cars back to Boaz?
A. Yes, sir.
195 Q. You saw Mr. Peery there, of course, after the wreckage?
A. I did.
Q. The caboose was practically torn to pieces wasn't it?
A. Yes, sir.
Q. Your train was made up of empty coal cars, with the exception of the loads?
A. Yes, sir, that is all.
Q. What were the loads?
A. A carload of steel, and a carload of scrap-iron.
Q. Belonging to the company, I suppose?
A. I guess.

Cross-examination.

By Mr. Hoke:

Q. This fellow Warford was not hurt at all was he?
A. No, sir; he helped us to put Peery on—get him up and put him on the engine.
Q. That is, Warford was Peery's flagman, who was in the caboose with him at the time?
A. Yes, sir.
Q. Now, before you left Fulton, with second 180, did you get any order other than this number 87?
A. Well, we got our meeting order with an extra at Mayfield.
Q. There seems to be here an order numbered 94, reading as follows: "Extra 1605 south meet first number 180, engines 876
196 and 367, coupled at Hickory and meet second number 180, engine 605, at Mayfield."
A. That is right.
Q. "First number 180 takes siding at Hickory." Now where was Hickory with reference to Mayfield?
A. It was the station north.
Q. Do you remember what time you left Fulton?
A. Something like 6:40 I think it was.

Q. And you had this Mikado engine and how many cars?
A. 55 cars.
Q. All empties except two loads?
A. Yes, sir.
Q. At the rear of the train?
A. Yes, sir.
Q. Where was your first stop?
A. At Water Valley.
Q. How far is Water Valley from Fulton?
A. I guess it is about eight miles, something like that, or seven.
Q. When you got to Water Valley what did you do?
A. Headed in the passing track to meet 101.
Q. A passenger train coming south?
A. Yes, sir.
Q. Was first 180 there at the time?
A. Yes, sir.
Q. You were both on the passing track?
A. We was.

Q. Was your engine near Peery's caboose?
197 A. Yes, sir.
Q. And did you see Peery then?

A. Yes, sir.
Q. Where was he then?
A. He was in the caboose.
Q. What was he doing?
A. Playing cards.
Q. Did he invite you to play cards with him?
A. He did.
Q. Did you play with him?
A. I didn't; time here was too short.
Q. After 101 passed you there, did you pull out?
A. I pulled out after Peery pulled out.
Q. How long after Peery pulled out did you pull out?
A. Pulled out right away; we followed first 180; and after we closed the main line switch, we pulled a draw bar.
Q. You pulled a draw bar?
A. Ten cars from the caboose.
Q. That disabled the car?
A. Yes. sir
Q. Then what did you do with that car?
A. Backed the balance of the train up to the main line and switched that into the passing track.
Q. How long did that take you?
A. Well, we was there about 25 minutes.
Q. After the draw bar was pulled out?
A. Yes—every bit of it.

Q. So that when you started out north again about 25
198 minutes had elapsed since Peery had gone.
A. Something like that, yes.

Q. So that you left Water Valley with 25 minutes between the trains?

A. Yes, sir.
Q. First and second 180's.

No answer.

Q. Where did you next stop?
A. At Mayfield hill.
Q. And is that south or north of Mayfield?
A. About two miles, about two and one-quarter, I guess, south of Mayfield.
Q. What happened there?
A. Pulled a draw bar.
Q. And what did you do then?
A. Carried it to Mayfield and set the cars and returned to the balance of the train.
Q. How long did that delay your train?
A. Oh I guess that was 25 minutes.
Q. That is just an estimate of yours?
A. Yes, sir.
Q. Having set the car out and coupled up, did you start up again?
A. I did.
Q. Pulled up the Mayfield hill?
A. Yes, sir.
Q. And went through Mayfield?
A. I did.
Q. Did you stop there?

A. Not only when I went up—not after getting the train
199 hooked up again; went through Mayfield slow enough to get the number of this engine we was to meet at the side track.

Q. Did you find when you were going into Mayfield that this 1605 south was there?
A. It was standing at the north end of the passing track when I set the car out—I mean the south end, the engine was.
Q. Did you go right through on the main line?
A. Yes, sir.
Q. Was there anything there to indicate whether they had been there some time or not?
A. They had the road crossing cut there.
Q. How many?
A. There is only one there.
Q. How about the block signal or board?
A. It was clear.
Q. What did that indicate to you in railroad practice?
A. That there was as much as ten minutes or more ahead of me.
Q. That is, that Peery was at least ten minutes ahead of you?
A. Yes, sir.
Q. Out of Mayfield?
A. I didn't know how much more.
Q. But since you had last left Peery at Water Valley—which was how far south of Mayfield, about?
A. About 17 or 18 miles.
Q. Since you had last seen him there you had had these two draw

bars pull out and been delayed on that account about 50 minutes?

200 A. Something like that, yes.

Q. Now, what about your speed from Water Valley to Mayfield?

A. Well, it was pretty slow; there was several hills in there—nothing but hills and we couldn't run on an average—I don't suppose you could average over 15 miles an hour.

Q. With that train.

A. If you done that well, because it is nothing but hills in there.

Q. You would make more speed going down, but——

A. Lose it going up on the other side.

Q. By the way, was there a speed limit on your engine?

A. A thirty-mile limit on all classes, on these Mikado engines.

Q. What kind of an engine was that? Describe it generally?

A. This was a 1600 class engine with a superheater attachment to it.

Q. How many drivers?

A. There is ten drivers.

Q. Only three drivers on a side?

A. Oh, no, five.

Q. Five on a side?

A. Five.

Q. There would be five drivers on a side?

A. Yes, sir; they are a heavy-duty engine.

Q. Not a speed engine at all?

A. No, they are not the largest wheel, they have by a whole lot.

201 Q. A comparatively small-wheeled for a freight engine?

A. Oh yes; they are medium height. I believe one class had a larger wheel than this.

Q. Now, on that engine there was a speed limit of thirty miles an hour?

A. Yes, sir.

Q. And that meant that under no circumstances should engineers operating that class of engines, exceed a speed of thirty miles an hour?

A. Yes, sir, that was just a special bulletin put out. Nothing in the book of rules covers that.

Q. Why was that limit put on?

A. On account of the track and heavy engine.

Q. Tremendously heavy engine——

A. And bridges and things like that.

Q. Bridges and curves. When you got into Mayfield and met this extra 1605 south, did you know whether Peery's crew which had been originally there to meet 1605 south at Hickory, about six miles north of Mayfield, had in fact passed 1605 at Mayfield or at Hickory, or were you simply relying on your orders?

A. I didn't know but what he met them at Hickory.

Q. You supposed they had met them at Hickory?

A. That is the only thing I could suppose; that is the only thing I had to show.

Q. Now if that had been true, how far would that have put them ahead of you, according to your calculations, as you came into Mayfield there?

202 A. They should have been close to Krebs, ought to have been close to the Paducah yard.

Q. How much do you figure the time that it would take this 1605 south to get down from Hickory to Mayfield and get into clear on the sidetrack and cut the crossing?

A. Well, it would take them 10 minutes to get over there and 1605 to go from Hickory to Mayfield and get in there and cut crossings; it would take them 20 or 25 minutes. It takes them 12 to 15 minutes to go over there with the train without closing any of the switches or opening any to get in.

Q. So that you knew from the start that they were at least 10 minutes ahead of you out of Mayfield and you figured from your orders and from the fact that 1605 was there at Mayfield that they naturally would be 26 or 30 minutes ahead of you?

A. Yes, sir.

Q. Might be in Paducah. How fast were you running your train through Mayfield?

A. Oh, something like six or eight miles an hour.

Q. Is it hilly through there?

A. There is a hill coming up in there; I had to slow down to get at the meeting point and it is kind of a little town, can't go through there very fast, just look out for your crossings.

Q. Well then, did you go right on through up to the time of the accident?

A. Yes, sir.

Q. Up through Viola and Boaz and down over the Camp

203 Creek trestle and then the collision occurred?

A. Then the collision occurred.

Q. Now, what about your speed during that trip from Mayfield to the time of the collision?

A. Well, I made, I guess, from 20 to 25 miles an hour from Mayfield to Boaz; then it was cut down considerable up there, got a hill to climb coming north out of Boaz.

Q. A hill to climb coming north out of Boaz?

A. And it cut me down to 7 or 8 miles an hour; I expect I was not going over six or seven miles an hour on account of climbing some of the hills.

Q. How far from the place of accident was Mayfield?

A. It is about fourteen miles; I think the 14-mile post is somewhere near.

Q. How far was the place of the accident from the summit of the last hill that you climbed before the time of the accident?

A. Something like a mile and a half or three quarters; it might be some close to two miles, but I think it is a little bit less than that.

Q. Well, then for the next two miles up to the place of the accident, what was the character of the grade?

A. North of the accident?

Q. No, no, north of the hill that you climbed out of Boaz?

A. Well, we have a little sway in there, then what you call just a little bog bank to go over, and you go over something like
204 15 to 18 miles, and then you drop down into Camp Creek.

Q. And down into Camp Creek is it down grade?

A. Yes, sir.

Q. On that you can pick up a little speed?

A. Yes, sir.

Q. I suppose it was down that hill that you ultimately attained this speed of about 25 or 30 miles an hour?

A. They was going something like that when I crossed over Camp Creek.

Q. Had you been looking ahead all that time?

A. I had.

Q. I take it that you had not seen any red lights?

A. I hadn't seen any since I left Water Valley.

Q. We have a map here, called Deft.'s Ex. 1, and I have talked with you somewhat about this map; I have it unfolded now so that Camp Creek is that little blue stream right through the center and there are some little marks that indicate the bridge over that Camp Creek. Now will you please indicate on that map just about where you figure you were when you first saw the red lights ahead of you?

A. Well, you are going north?

Q. Yes, that is going north.

A. And this is Camp Creek trestle?

Q. This is Camp Creek trestle.

A. Well, there is a curve right in here (pointing).

Q. Yes, that is the curve north of the trestle.

205 A. Well, I first saw them right in here.

Q. This is at what point?

A. Right there, the curve right along in there; I was right on there at that place.

Q. Well, now, I will have you make a mark and then I will draw another mark and put an "R" I think and it will show the jury where you think you were when you first saw them. Now I will run a line up there from that mark and mark it "R." That is where you think you were?

A. That is where I was; I don't think anything about it, that is where I know I was.

Q. And how far north of you was the caboose?

A. Something like 8 or 10 car lengths the best I could tell looking right at them, but then I judge, from the time I hit them, it was something like 8 or 10 car length-.

Q. Was it off the curve or just at the point of the curve?

A. Just going off of the curve——

Q. Just going off of the curve?

A. —when I put the brakes on.

Q. The curve swinging around to the left of you?
A. Yes, sir.
Q. How many red lights did you see?
A. Three.
Q. Where were they located?
A. Two on the rear corners—each corner of the rear of the caboose—and one on top of it, in what they call the cupola.
Q. The cupola?
206 A. Yes, sir.
Q. Are you sure that that cupola light was turned red on you?
A. I were.
Q. What did that indicate to you?
A. That they had reduced speed or else stopped.
Q. In accordance with the rule that we have read?
A. Yes, sir.
Q. Could you tell whether they were actually stopped or not?
A. No, sir, I couldn't tell if they were stopped, I couldn't tell if they was moving; I tried to tell.
Q. Could you see any sparks by way of exhaust from the front engine?
A. Not a one.
Q. Could you tell that there were any engines attached to this caboose?
A. I couldn't—didn't think there was.
Q. You thought it was simply the caboose alone?
A. That is all I thought it was.
Q. What did you think about that?
A. I thought the caboose was broke off and the engine going on.
Q. What was the first thing you did when you saw the caboose ahead?
A. Threw my brake into emergency.
Q. You dynamited your air-brakes, as they call it?
A. Yes, sir, and commenced whistling.
Q. What kind of a whistle did you blow?
207 A. A succession of blasts, kind of a stop-along, I call it—several blasts of the whistle.
Q. An alarm signal?
A. Yes, sir.
Q. Then what did you do?
A. Well, when I felt the brakes going on, I stopped, I thought maybe I would get a stop, and when my engine commenced sliding, I commenced whistling; then I knew I was about to hit them, I was within about two car lengths of them.
Q. Then you whistled again when you were within two car lengths of them?
A. Yes, sir.
Q. Then where did you get?
A. I got behind the boiler head.
Q. Then the crash came and your engine got stopped you think about ten car lengths beyond that point?

A. Yes, something under that, but I would say to be sure, it was about that.

Redirect examination.

By Mr. Anderson:

Q. I meant to ask you about the names of some of the crew. Who was your fireman?
A. Mr. Shelton, Earl Shelton.
Q. Is he here?
A. Yes, sir.
Q. Who was Peery's engineer?
A. Mr. Morse.
Q. Is he here?
A. No, sir.
208 Q. Is he working for the road?
A. He was the last I knew of him.
Q. Well, how recently have you known of him being with the road?
A. Well, I know about a week or a little over.
Q. He is running an engine for the Illinois Central, isn't he?
A. Yes.
Q. Was the fireman Mr. S. S. Fisher?
A. Yes.
Q. Is he with the road yet?
A. Yes, sir.
Q. Is he here?
A. No, sir, I think not.
Q. The head brakeman was Essie Williams on Peery's train, wasn't he?
A. That is right.
Q. What happened to Williams?
A. He was hurt—and died afterward.
Q. Where is Warford?
A. He is working.
Q. For the company?
A. Yes, sir.
Q. Down there on the same run?
A. Yes, sir.
Q. Is he here?
A. No, sir.
Q. And the engineer on the other engine, was Mr. Cooper, wasn't it?
A. Yes, I think so.
Q. Is he here?
A. No, sir.
209 Q. Is he working for the company?
A. I think not.
Q. Do you know where he is?
A. No, sir.
Q. And the fireman was Mr. Donahower?
A. I don't know his name.

Recross-examination.

By Mr. Hoke:

Q. Didn't Mr. Anderson have those fellows up there at the office at the time your deposition was taken?
A. I am pretty sure he did.
Q. He had all of them up there?
A. He had Morse I know, the same day I was there, and I think he had Fisher, but I am not sure, but I know Morse was there.

Mr. Anderson: I will read the deposition of Dr. James Thomas Gilbert taken at Paducah, Kentucky, on the former trial, and on record here in court, taken under notice.

Deposition of Dr. J. T. Gilbert, Taken on Behalf of Plaintiff.

Direct examination.

By Mr. Anderson:

Q. State your full name, Doctor.
A. James Thomas Gilbert.
Q. Where do you reside?
A. Paducah, Kentucky.
Q. What is your profession?
A. Osteopath physician.
210 Q. Are you practicing your profession in this city?
A. Yes, sir.
Q. How long have you been so practicing?
A. Ten years.
Q. State whether or not you are authorized to practice as an Osteopath in the State of Kentucky.
A. I am.
Q. Doctor, did you treat the plaintiff in this action, Robert H. Peery?
A. I did.
Q. Can you tell us when you first examined him?
A. March 14th, 1912.
Q. Where did you make the first examination?
A. At my office, 642 Broadway.
Q. What was the nature of the examination you made at that time, was it a physical examination?
A. I made a full examination of the case; stripped him to his waist.
Q. What particular part of his body did you examine?
A. From his waist line up.
Q. Did you make any special examination of his right shoulder and back?
A. Yes, sir, right shoulder, back and spine.
Q. Did you treat him after that?
A. Yes, sir.
Q. How many times did you treat him?

A. I gave him eight treatments.

Q. Can you give us the dates?

211 A. March 14, 16, 18, 20, 22, 25, 27 and 29th.

Q. Are you able to state, doctor, from your examination and treatments, what trouble or troubles, if any, he had as to his shoulder?

A. To the best of my recollection I found that shoulder down; it seemed as though where the clavicle or the collar bone joins the shoulder some ligaments seemed to have been broken loose and that shoulder seemed to be lower, and it was considerably lower than the other shoulder and those ligaments must have been broken and healed up too short, is the way I found it; and on trying to raise his arm it would not come up to a right angle. It seemed that those muscles seemed to be drawn and it seemed as though he complained of a pain continually in the shoulder and also running down the arm and down into the wrist.

Q. What if anything, did you discover that was abnormal in his back?

A. I found that the lower cervical vetebrae, I think the sixth and seventh cervical vertebrae and first, second, third and fourth dorsal vertebrae were injured, and I found several of the cervical vertebrae to the right, but don't remember which ones; I did not make a notation of which ones of those that were to the right; but there were several to the right; and to explain that: it was what is usually termed spinal curve.

Q. Was it a normal or abnormal condition?

A. Abnormal, and around those cervical vertebrae the muscles were greatly contracted and highly irritated.

212 Q. What effect, if any, did the condition described have upon the nerve centers?

A. To irriate the nerve centers.

Q. So far as you could see and observe at the time of the examination and treatments, what effect was observable to you upon particularly the general health and physical condition of the plaintiff, growing out of this condition of the back?

A. You want to know what effect it had on the general symptoms?

Q. Yes, especially back.

A. I believe that that spinal condition caused to a great extent, if not to a full extent, the condition it was in.

Q. What condition did you find the plaintiff in?

A. I found him in a very nervous condition, and suffering with continual pain in the neck, shoulder and extending down the arm and to the elbow, and sometimes to the wrist.

Q. What effect, if any, would the condition you have described as to the spine have upon his head, having reference particularly as to whether or not it would likely cause headaches?

A. The condition I found his spine in would naturally cause congestion of the brain, more or less; and in the majority of such cases it produces frequently a severe headache.

Q. State whether or not when you treated him on these days

that you have mentioned about his back and spinal column and cervical vertebrae, did you resort to any treatments?

A. I gave him the Osteopathy treatment, which is a mechanical manipulation.

213 Q. In your profession you use mechanical manipulation to distinguish from medicine and drugs?

A. Yes, sir. Of course the idea was to replace those misplaced vertebræ and restore to normal parts.

Q. What was the result of the treatment as to the back?

A. Some improvement, but I treated him such a short time that I could not make a very marked result.

Q. Are you able to express an opinion from your examination and treatments on the question and subject of the permanency of the injury to the condition of his back?

A. Yes, sir.

Q. What is your opinion as to the prognosis of the case as to the back and conditions described as existing?

A. I believe he has a permanent trouble there that chances are that he will not be able to overcome, even under the Osteopathy tratment of pressing, as it has become *a* chronic.

Q. What effect will that have upon his ability to perform manual labor, such as heavy lifting, in the future?

A. I think likely he will be able to do a little light work, but I believe that he possibly will not be able to perform his regular occupation of the past.

Q. And by that occupation, you understood he was a railroad conductor?

214 A. Yes, sir.

Q. What is your opinion with reference to the shoulder, as to whether or not the condition there is temporary or will be permanent?

A. I believe that he will, with the proper treatment, under the Osteopathy treatment, gain considerable use of it, but he will also have more or less stiffness and nerve irritation there.

Cross-examination.

By Mr. Charles K. Wheeler:

Q. Doctor, are you a graduate of any other school of medicine than that of Osteopathy?

A. I am not.

Q. Where did you graduate in Osteopathy?

A. Southern School of Osteopathy, Franklin, Kentucky.

Q. How long were you in school in studying medicine, Doctor?

A. Four terms of five months each.

Q. Did you study anatomy?

A. I did.

Q. Can you name the muscles that touch the shoulder?

A. I can name a part of them.

Q. How many muscles touch the shoulder, numerically?

A. I could not tell you the exact number.

Q. What is the principal muscle that touches the shoulder, and give its functions and its services?

A. Biceps and triceps are the muscles of motion.

215 Q. Where does it originate, and where does it end?

A. It originates in the hands and is attached to the clavicle and the acromial process of the scapula and is attached to the long bone of the arm.

Q. What do you mean by the long bone of the arm, and what portion of it touches the muscle you mention?

A. The lower part of the femur.

Q. Was it the muscles you mention you found sensitive?

A. The upper end was sensitive.

Q. Did you find any other muscle that was sensitive?

A. It seems all around the articulation of the clavicle and scapula the ligaments were irritated.

Q. What I want you to do is to name the ligaments or sensitive muscles.

A. I don't know that I could name all the ligaments there.

Q. Doctor, was there anything perceptible from an ocular examination in this man's shoulder that was abnormal?

A. What do you mean by an ocular examination?

Q. What I mean is, from looking at the man's shoulder, could you see that there was anything wrong with it?

A. Yes, sir.

Q. Let us have it.

A. It seemed lower than the other shoulder.

216 Q. Well, do you state it as your opinion from the fact that one shoulder is lower than the other, is of itself an abnormal circumstance?

A. That combined with other symptoms makes it an abnormal condition.

Q. What I asked you was, is it a fact that one shoulder lower than another, is an abnormal circumstance?

A. It is an abnormal circumstance, and not necessarily an indication of disease, Mr. Wheeler; but it is an abnormal circumstance.

Q. Doctor, this "other circumstance" that you have spoken of in connection with the lower shoulder, did that other circumstance come from the history of the case, or from what you yourself discovered?

A. The condition of the spine, and that came from my examination.

Q. What came from your examination?

A. The finding of the condition of the spine.

Q. I am speaking of the condition of the shoulder; you have stated the condition of the spine.

A. Taking the condition of the spine in connection with the shoulder, you would find the tenderness there from my own articulation.

Q. Tenderness where?

A. All around the articulation; if I found no tenderness around

the lowered shoulder, I would pay no attention to it; there was no pathology condition there.

Q. What did his spine have to do with his shoulder?

217 A. The condition that the brachium was in originates in the spine, and the brachium runs through the shoulder to the arm.

Q. So you mean to be understood as saying, in the terminology of every day, that if a man has a sore back he is likely to have a sore shoulder also?

A. It is possible.

Q. Is it probable, and if so, was that the case in the patient we are talking about?

A. It is probable, and I believe it had quite a good deal to do with the condition of the shoulder.

Q. Then, if I understand you, what you mean to say is the trouble with this man's back is what produced the soreness in the shoulder, is that correct?

A. Not entirely, but in part.

Q. I understood you to say that it had a good deal to do with it?

A. I said a part.

Q. Well, do you want to withdraw the expression, a good deal, and say in part, or do you want it to stand as you originally uttered it?

A. I will let it stand.

Q. Then it is true in your opinion that the sore back had a good deal to do with the sore shoulder?

A. Yes, sir.

Q. Meaning to say that the soreness of the shoulder caused principally the soreness of the back?

A. No, in part just as I said before, but there was two troubles there.

218 Q. Did you find two separate sore places in his shoulder?

A. Two in his shoulder?

Q. Yes.

A. It was tender and sore down to the middle of the upper arm.

Q. You have just said that there was two ligaments?

A. The ligaments in the spine, cervical vertebræ and dorsal vertebræ, and the one in the shoulder.

Q. That is a little too indefinite, I want the name of these two ligaments which caused the soreness?

A. It was an anterior condition of the sixth and seventh cervical vertebræ, the first, second, third and fourth dorsal vertebræ, which produced an irritation of the nerve centers in that region.

Q. You are talking about the back bone and I am asking you again to name the two ligaments that were sore, which were the two in the shoulder?

A. I misunderstood you, I mean one in the spine and one in the shoulder; and I just described the one in the spine, and now do you want the one in the shoulder?

Q. Please give the one in the spine again.

A. It was an anterior condition of the sixth and seventh cervical vertebræ, first, second, third and fourth dorsal vertebræ.

Q. Doctor, will you please file the little yellow piece of paper which you have and mark it for identification with your name?

219 A. This is simply a notation I took off my books.

Q. Will you file it as a part of your deposition, you can answer that by yes or no?

A. Well——

Q. Will you do so?

A. No, I don't care to do it; it is simply a notation and could not be made out anything else.

Q. Will you permit me to examine it?

A. Yes.

Q. Doctor, this paper which I hold has certain names and dates on it, have you any objection to this being filed as part of your deposition?

A. You can see it is only a notation, Mr. Wheeler.

Q. I am not going to try the case, doctor; I want to know if you will file it.

A. I just simply copied it as a notation from my books.

Q. Why did you write the words anterior, cervical, scapula and clavicle on this paper?

A. Simply because I made some notations on my book when I examined the man, not knowing it was going in Court; so I took the dates of the treatments and the number of the vertebræ to refresh my own memory and put it on this piece of paper.

Q. Is it not a fact that you wrote those names, anterior, scapula, cervical and clavicle in order to refresh your own memory that you might use medical terminology with which you are not familiar in your practice?

220 A. No, sir.

Q. Is it customary or usual for a practicing physician to write down the names such as you have put on this little piece of yellow paper that are in daily use by the physicians of Old School of Medicine?

A. I don't know what is customary in regard to the matter, but it is considered the best ethics for a physician to keep a notation of all the cases treated.

Q. I was speaking of the employment of a memorandum by a physician to refresh his recollection in the use of words that are common to the Old School of Medicine, and what I was asking you was, is it a common thing for a reputable practicing physician of the Old School of Medicine to have to refer to a memorandum when he wishes to employ medical terms such as you have written on this little piece of paper?

A. When an examination is six months in the past, if he does not make a notation or some record of the case, it is very hard to call exactly to mind.

Q. Now this back bone portion of the injury, you say some of the vertebræ was misplaced?

A. Yes, sir.

Q. And a muscle connected with these misplaced vertebræ went up to the shoulder, is that what you said?

A. I said that the nerves lead from the vertebræ to the shoulder.

Q. Do all the nerves of the vertebræ lead to the shoulder?

221 A. No, sir.

Q. Which of the nerves from one of the misplaced vertebræ leads to the shoulder?

A. A filament from the sixth and seventh cervical and first dorsal.

Q. What is a filament?

A. It is a branch.

Q. A branch of what?

A. A branch of nerve.

Q. A branch of nerve?

A. The sixth and seventh cervical and first dorsal.

Q. Doctor, do you say that the bicepts extend from the shoulder joint to the forearm?

A. It extends from the shoulder to the lower part of the upper arm.

Q. Does it extend to the forearm?

A. No.

Q. What is your answer to that, doctor?

A. No, I believe not.

Q. Do you know?

A. Yes, it extends to the lower part of the upper arm.

Q. I asked you if the biceps extended to the forearm?

A. No.

Q. Do you know what the forearm is?

A. It is from the elbow out.

Q. Then you say the biceps do not go below the elbow?

A. No.

222 Q. How did you come to see this man?

A. He came to see me.

Q. Who sent him to your office?

A. I don't know.

Q. Was you not called by a physician and an engagement made for you to see this man, and don't you know that is true?

A. I was called by a physician, but it seems to me that it was after I had seen the man. I would not say positively about that.

Q. Didn't a physician call you about this man?

A. Yes, and he said he had treated him and thought perhaps I could do him some good; so he sent him to me.

Q. You say the physician had treated him?

A. Treated and examined him.

Q. Is it not a fact that he was examined by a physician, and that this physician told him to come to you for you to rub his muscles?

A. He said something to the effect; he told me, he thought perhaps I could do him good, as medicine would not.

Q. Doctor, how do you treat a man for any ailment?
A. Treat a man for any ailment?
Q. Yes.
A. By adjusting abnormal conditions.
Q. Suppose a man comes to you with stomach ache, what do you do with him?
A. I quiet the nerves that lead to the stomach. A stomach
223 ache is nothing more or less than an irritation of the nerves of the stomach.
Q. How do you quiet them?
A. By an innervation of the nerves in the sphanchnic area and also an innervation of the sole apex.
Q. Now, doctor, I will ask you what you did.
A. I told you what I did.
Q. Not exactly, I want to know how you treat a man that has the stomach ache.
A. Inhibit pressure over the nerves that go to the stomach.
Q. Do you mean that you press on the nerves?
A. Yes, and quiet them.
Q. What do you press on them with?
A. My hand.
Q. Now suppose he had the backache, what do you do?
A. It depends on the cause of the backache.
Q. What causes backache?
A. There are many causes; I will cite a few, one is a contraction of the muscles in the region of the pain, and another is a misplaced vertebrae in that area; and you asked what I did for it. If it is contracted muscles we relax them, and if it is misplaced vertebrae we replace it.
Q. Now suppose it is a contracted muscle, how do you treat that?
A. By stretching it and stimulating the circulation, *aid* usually relax it.
Q. How do you stretch it?
A. By mechanical manipulation, with our hands.
224 Q. That is what some people call massage, is it not, doctor?
A. It is not.
Q. Well, it is what ordinary people call rubbing, is it not?
A. Perhaps ordinary people do. We don't seldom treat next to the skin, we treat through a layer of garment.
Q. Can you do it by putting your hands on them?
A. Sure.
Q. If a fellow comes to you with a pain in his back, such as we call rheumatism or lumbago, what do you call that?
A. If it is lumbago, we call it lumbago; it depends on what it is.
Q. What produces lumbago?
A. It is sometimes caused by a deep contraction of the muscles in the lumbar area.
Q. Is it not a fact that in your practice you frequently find misplaced vertebræ in the back?
A. It is.

Q. It is a rather common ailment indicating pain in the back, is it not?

A. Yes, sir.

Q. And in your School of Medicine, Doctor, you teach that practically all human ailments flow from some misplacement of the muscles, vertebræ or some derangement of a nerve center, is that not true?

A. That is true with a number of adjuncts and diseases.

225 I would add to that some irritation, such as stomach trouble— I will withdraw that and give a definition of it: Most diseases are caused from a *legion* — such contracted muscles, misplaced vertebræ, or contracted ligaments or irritated nerve centers or nerve tendons.

Q. You don't give medicine at all, do you, doctor?

A. No, sir.

Q. And you rely entirely upon what you term mechanical manipulation?

A. No, we use hydropathy and massage, electricity, vibration and similar adjuncts.

Q. What is hydropathy?

A. Treatment *of* water, bathing fevers, etc.

Q. Doctor, if this man had remained in your treatment, do you think you could have gotten his muscles all right?

A. I could have benefitted him a good deal, but I don't believe we could have gotten them anything like in a good condition, considering his age and the length of time it had been since the accident.

Q. How long had it been after the accident when you saw him?

A. It was in March, and I understood the accident happened in December.

Q. He told you then that he had an accident when he came to you?

A. Yes.

Q. He also told you where he was suffering and what was the matter with him?

A. He gave me the symptoms he suffered with.

226 Q. He told you where to look for the pain?

A. He told me where he suffered with pain.

Mr. Anderson then read the deposition of Dr. M. E. THOMAS as follows:

Direct examination.

By Mr. Anderson:

Q. Doctor, are you a practicing physician and surgeon?

A. Yes, sir.

Q. Where is your office?

A. In Graves and McCracken Counties, practice in both counties.

Q. Are you a graduate of some medical college?

A. Of Louisville, Memphis and Nashville colleges; I am registered in Graves County.

Q. Do you know the plaintiff in this case, Robert H. Peery?

A. Quite well, raised with him.

Q. Did you make an examination of him after the accident?

A. I was called to see him the night he was injured and did not get here until the next evening, and I was called by his family.

Q. When did you examine him?

A. The night following the injury; if I remember, some time about the middle of the night I was called by the family, and did not see him until the next night, after the 121 train gets in here at about 8 o'clock.

Q. In this last answer, the time referred to is how long, the night of the accident, one night or two nights after?

227 A. I did not catch the train that night; it was somewhere about twenty-four hours after the accident. The best I could know about those freight trains, he got hurt somewhere from midnight one night, and I saw him the next afternoon.

Q. What was the nature of the examination you made at that time, did you strip him or examnie him thoroughly?

A. I came down to the hospital and asked for Mr. Peery, and they sent a negro with me to his room, and I found him lying on the bed and made as close an examination as I know how, and found a broken clavic*al* or collar bone, and also a dislocated collar bone on the sternal end, or the stern end, I don't know how to put those in as Dr. Gilbert was telling about the vertebræ, and a dislocation of the manubrium, the upper part of the breast bone, and I afterwards examined him and found a fracture of the anemia process of the scapula. That is all I found with Mr. Peery, and that is all I know of him. I have examined him twice since that time and found nothing only the injury to the spine.

Cross-examination.

By Mr. Wheeler:

Q. When did you next examine him, doctor?

A. I don't remember the date, but he came to Mr. McNeil's and he and I were going fishing.

Q. Was that some time in March?

A. I think it was earlier than that.

Q. Was you and this man fishing?

228 A. He came out to go fishing, but took sick and sent for me to come over to Mr. McNeil's and he had to come home that night.

Q. Well, you examined him another time after that, did you not?

A. Not to my recollection.

Q. I understood you to say that you had examined him twice since then?

A. Twice since the hospital examination; he and I went to Fulton and stopped at Boaz, and I don't remember the date and I examined him there.

Q. Now, doctor, the injuries you have described to his shoulder comprise all the injuries you discovered?

A. There is an injury to that spine somewhere, but from my examination I can't locate it; it is there though. It is either in the cervical or dorsal region, I don't know where, but from that jumping on his shoulder there I know it is there; I just simply want to play honest about that, I don't know.

The plaintiff here rested.

Mr. Hoke then opened on behalf of the defendant.

HERBERT WILLIAMS, sworn on behalf of defendant, testified:

By Mr. Hoke:

Q. Where do you live, Mr. Williams?

A. Fulton, Kentucky.

Q. What is your occupation?

A. Train dispatcher.

Q. Were you train dispatcher *ot* Fulton at the time of this collision?

229 A. Yes, sir.

Q. The trains were being run under your direction?

A. Yes, sir.

Q. It was you, I take it, who issued this order number 87, reading as follows: "Engines 876 and 367 coupled and 1603 run as first and second number 180 Fulton to Paducah; first number 180 must not exceed a speed of 15 miles per hour."

A. Yes, sir.

Q. You made that order?

A. Yes, sir.

Q. And have you any figures here indicating when that order was communicated to the conductors of the two sections of 180?

A. The order was placed at the telegraph office addressed to these two trains at 4:30 in the afternoon.

Q. When did Mr. Peery get or had Mr. Peery signed the order and got "complete" at 5:07 P. M.—that meant that he could go?

A. Yes, sir, that permitted him to go.

Q. What time did Gorman get the order so that he could go?

A. Gorman got "complete" on the order at 6:35 P. M.

Q. And he could not go before that?

A. No, sir.

Q. Why was this speed restriction of 15 miles an hour placed upon first 180?

A. On account of having the pile driver.

230 Q. Why would the pile driver necessitate a restriction as to speed?

A. Well, a pile driver and ditching machine loaded on such equipment that we have instructions from the superintendent when we run them that we must restrict the speed.

Q. Did that restriction have anything to do with the condition of the engines?

A. No, sir.
Q. Have you any means of telling what time Peery actually left Fulton going north?
A. We can tell by the train sheets.
Q. Is this train sheet in your own handwriting?
A. Part of it is, from p. m. to midnight.
Q. The part that covers this matter is in your own handwriting?
A. Yes, sir.
Q. What time did Peery's train leave Fulton?
A. 5:20 p. m.
Q. What time did Gorman leave Fulton?
A. 6:45.
Q. Did they have any other orders as they left Fulton?
A. Yes, they had an order number 94.
Q. And what was that, please?
A. Extra 1605 south, meet first number 180, engines 876 and 367 coupled at Hickory, and meet second number 180 engine 1603 at Mayfield.
Q. They had those orders before they left Fulton?
A. Gorman got the order at Fulton, Peery received the
231 order at Mayfield, the next open telegraph station.
Q. He had departed then before the order was given?
A. Yes, sir.
Q. What was the next order given those two trains or either of them?
A. I gave them order number 99.
Q. Read that please.
A. "First number 180, engines 876 and 367 coupled, meet extra 1605 south at Mayfield, instead of Hickory."
Q. So that changed 94?
A. That changed 94 to Peery.
Q. To Peery, yes.
A. Yes.
Q. But did Gorman ever get that?
A. No, sir.
Q. Gorman never knew then—Robertson's crew never knew that the meeting place between 180 and 1605 south was changed from Hickory to Mayfield?

Mr. Anderson: Just a moment. I doubt if Mr. Williams knows what Gorman knew.
Mr. Hoke: I mean so far as your records show.
A. So far as my records show.

A. So far as my records show he did not.
Q. Now then what was the next order you gave either of these crews?
A. 107. I placed this order to both of these trains at Mayfield, reading Engine 1603, 876 and 367 coupled, reverse positions
232 as first and second number 180 from Hickory to Paducah yard."

Q. And who received that order according to your records?

A. Operator Murphy at Mayfield.

Q. Was that order, according to your records, ever delivered to either Peery or Gorman?

A. I don't think the order was delivered; it doesn't show that this order was delivered.

Q. And what was the occasion of giving that order? Just explain that to the jury.

A. Well this train not showing up at Mayfield, Peery not showing up at Mayfield in a reasonable length of time as he should have. I figured that he was delaying Gorman and I was going to put Gorman ahead of him and let Gorman go.

Q. Going to reverse positions?

A. Going to reverse positions; that put Gorman out of Hickory, the next station north of Mayfield. I couldn't do it at Mayfield very well on account of having a south bound train on the sidetrack without delay, I thought that Gorman was behind Peery at Mayfield when I placed the order.

Q. Well then did you later learn what the fact was in that regard?

A. Well, the operator said that he could not get the train coming, and he says first 180 says let them go so they can make as good as second 180 if you take up that restriction. And he says "we have set the pile driver out on the water spur and we can go as fast as first or second 180 can go."

Q. So then what order, if any, did you make?

233 A. The order following that is placed four lines after that, order 108.

Q. And that reads as follows:

A. It reads "Orders number 87 and 107 are annulled, engines 876 and 367 coupled display signals, and run as first number 180 Mayfield to Paducah yard."

Q. And were those all the orders issued affecting these trains prior to the collision?

A. Yes, sir.

Q. They were 87, 94, 99, 107 and 108?

A. I think that is all of them. That is all of them.

Q. Do your records show whether that last order was received by Peery?

A. Yes, sir, signed his name under it and the time "complete" given.

Q. What is that time?

A. 8:40.

Q. 8:40 P. M.?

A. Yes, sir.

Q. Do your records show whether Gorman ever got that order?

A. No, sir, he didn't get it.

Q. What did that mean with respect to the speed of Peery?

A. It meant that he could go with the regular rate of speed without any restrictions whatever.

Q. And what would that regular rate of speed have been approximately?

A. Well, the speed on the engine is 30 miles an hour.

234 Q. That would be the upper limit?

A. That is the upper limit, yes, sir.

Q. Now, can you look at your train sheet, so-called, and tell us what time Peery left Mayfield?

A. 8:50 p. m.

Q. Can you estimate from your records there by *comprising* the speed of other similar equipment running between the same points, north of Mayfield, what was the average speed at which such trains ordinarily ran from Mayfield to some place near the accident—is Boaz the nearest place of which you have any record?

A. That is the nearest telegraph office, yes, sir.

Q. That is how far from Camp Creek?

A. I think it is about two miles and a half south of Camp Creek.

Q. Now just look at your records and see what the average time made by similar trains—trains similar to Peery's—running from Mayfield to Boaz.

Mr. Anderson: Let me ask Mr. Williams before he gives testimony as to similar trains, I would like to have him tell what trains he is going to give testimony about. This is a train made up of one engine and a partially crippled engine and a caboose.

Mr. Hoke: It does not appear that this was crippled as to speed at all.

Mr. Anderson: No, it was being taken to the shops at Paducah.

Mr. Hoke: It was taking itself to the shops.

235 Mr. Anderson: Well, it was taking itself to the shops, then, if you like.

A. First 180 and 1606 went from Mayfield to Boaz—

Mr. Anderson: Just a moment. May I ask first, if the Court please, before he gives testimony as to the average speed of trains—we want to know what the trains are to see whether it has any bearing.

The Court: I suppose they ought to be similar or fairly similar.

Q. Explain what kind of train they are?

A. They are freight trains, loads and empties. The train was going south was a train that had 5 loads, including 2 dead engines—marked on the right side here. That was a train.

Q. Go ahead.

A. First 184, engines 1606, 5 loads, including two dead engines, went from Mayfield to Boaz in 17 minutes after starting from Mayfield.

Q. How far is Boaz from Mayfield? Doesn't it show there?

A. 9:09 miles.

Q. That is Mayfield to Boaz in 17 minutes?

A. Yes, sir.

Q. All right; are there any other examples there?

A. Yes, sir, second 184 engine 867——
Q. That would be the same class of engine as this 876?
A. Yes, sir. He had eleven loads and 10 empties. He
236 went from Mayfield to Boaz in 15 minutes, after starting from Mayfield.
Q. Any more?
A. 188, engine 796; he had 15 loads and 14 empties; went from Mayfield to Boaz in 17 minutes after starting from Mayfield.
Q. Any more there?
A. That is all, up until Peery's train.
Q. Now, take the day before.

Mr. Anderson: Hasn't he got Robertson's train record here now? Why not give Robertson's record?
Mr. Hoke: Why yes.
Mr. Anderson: Let's have Robertson's record this night.
Mr. Hoke: Sure, I didn't think about that.

Witness: Gorman and Robertson?
Q. Yes. On this trip running north.
A. He had two loads, 53 empties, leaving Fulton.
Q. Have you got him from Mayfield to Boaz?
A. No, sir, Boaz has no night office.
Q. He went by there after the night operator had gone?
A. After the day operator had gone.
Q. So you haven't any record about that. What time did Robertson pass Mayfield?
A. He passed Mayfield at 9:10 p. m.
Q. Twenty minutes after Peery left Mayfield?
A. Yes, sir.
Q. (Showing witness book.) Now this is the record for December 7, the day before the accident; I will ask you to look at
237 that and see whether there are any records there that bear upon this question.
A. These trains passing after I was on duty, I have no record of all before—I have just given you the figures on the trains that passed there during the day hours, while I was on duty; is that what you want?
Q. Yes, similar trains.
A. 188, engine 160 had 5 loads, Mayfield to Boaz in 18 minutes.
Q. That is the same engine that Robertson had, isn't it? That is the same engine the day before?
A. Yes, sir, they didn't have the regular engines then.
Q. I mean that is the same Mikado engine?
A. Same type of engine.
Q. The day before running from Mayfield to Boaz with how many cars?
A. Five loads—18 minutes.
Q. Five loads in 18 minutes.
A. And third 184, engine 1606—this is Peery and Robertson—had five loads and six empties.
Q. Peery and Robertson the day before?

A. Yes, sir.
Q. Going north?
A. Yes, sir.
Q. What time did they make from Mayfield to Boaz?
A. 18 minutes. There are two more trains on this sheet that used about 28 minutes, too. They had been delayed or by taking a side track to meet trains. Do you want those trains?
238 Q. No, not if the record shows they did not go straight through. Mr. Peery said that while he was waiting at Water Valley, first, second and third 155 south passed him there. That is, three freight trains going south passed him there. What do your records show about that.
A. There was only two sections of 155 that day.
Q. And what time did they get into Fulton?
A. First main at 3:45 and the second main at 3:50.
Q. And that was before Mr. Peery left Fulton at all, was it?
A. Yes, sir, Mr. Peery got to Fulton at 3:15.
Q. Does your record show that he passed any freight trains at Water Valley?
A. No, sir, he did not.
Q. Did you know Mr. Peery before this accident?
A. Yes, sir.
Q. Roughly speaking, how long had you known him?
A. Oh, four years.
Q. Four years prior to December, 1911?
A. Yes, sir.
Q. And during that time were you dispatcher at Fulton or were you agent at some other station?
A. I was dispatcher at Fulton during that time.
Q. Did you know him when you were agent along the line there at all?
239 A. I don't know whether I did or not; I don't remember.
Q. You don't remember him, anyway?
A. No, sir.
Q. So you have been a dispatcher there at Fulton about six years, is that it?
A. Just about six years I guess.
Q. There is a dispute as to whether prior to this accident, Mr. Peery was a noticeably erect man, whether he carried himself with his back straight and his head up or whether his back was bowed, whether he was a round-shouldered man who held his head in any peculiar way. Now I will ask you to state to the jury just what your recollections are with respect to his appearance?
A. Well, Mr. Peery has always been round and stooping shoulders, ever since I have known him. He never was straight, I never saw him walking that way. I have seen him in the office, he has come often to see me, and I have never noticed him being erect at all; he always walked stooping, always round-shouldered.
Q. And was there anything characteristic about the manner in which he held his shoulders or his head? Could you illustrate at all what you mean by being round-shouldered?

A. Well, I don't mean that he was stiff-necked or anything like that, but I mean he was just like *teh* ordinary person—not humpshouldered, but round-shouldered, high shoulders.

Q. High shoulders?

A. Yes, sir.

240 Q. You don't mean to say his neck was stiff?

A. No, sir.

Q. How did he carry his head?

A. He never carried his head back, he carried his head—well, I never noticed him looking upward when he was walking, just looking right direct in front of him, you know, his head about like—you see a lot of people walk that way.

Q. Was he a noticeably spry, brisk walker, or——

A. I never noticed him being, no, sir.

Cross-examination.

By Mr. Anderson:

Q. You were here in St. Paul in January, 1913, when this case was tried, were you not?

A. Yes, sir.

Q. Came here as a witness for the defense, I believe?

A. Yes, sir.

Q. And were here during the entire trial, as I remember it?

A. Yes, sir.

Q. You testified at that time?

A. Yes, sir.

Q. You were examined in chief by the attorney for the defendant then, Mr. Mitchell?

A. By Mr. Mitchell.

Q. Your attorney?

A. Yes, sir.

Q. And you then knew what you now know and all of it in regard to Mr. Peery, and his stature and contour of his back, did you not?

241 A. What was the question?

Q. You knew all about Mr. Peery and the shape of Mr. Peery at that time just as you do now, didn't you?

A. Yes, sir.

Q. And the subject was up and thoroughly threshed out at that time in court, wasn't it? As to whether he was stoop-shouldered or not, and his condition was all matter of discussion and evidence in that case at that time, wasn't it?

A. I don't remember whether it was or not.

Q. Well you do remember distinctly that the defense did not ask you a single question about it at the last trial, did they?

A. I really don't remember.

Q. Well, do you remember anything about being asked any question in court last January a year ago whether Mr. Peery was a straight man in his back or crooked?

A. I don't remember.
Q. Do you remember anything about being asked such a question?
A. No, sir, I do not.
Q. Well, I have the record here and there isn't any sign of evidence that you were asked any question on the subject. Do you know anything about the reason why the defense didn't ask you for this condition at that time?
A. No, sir.
Q. Had they talked with you about it?
A. Before hand?
Q. Before the trial, yes, asked you what you knew about
242 Peery's stature and the shape of his back?
A. I don't remember of anything of the sort.
Q. Mr. Payne is the claim agent and he is sitting back of Mr. Hoke?
A. Yes, sir.
Q. You knew him, and knew who he is?
A. Yes, sir.
Q. He was here at the time of that former trial, wasn't he?
A. Yes, sir.
Q. Came up with the witnesses?
A. Yes, sir.
Q. So you have no recollection of anybody asking you any question *of* whether Mr. Peery was a stoop-shouldered man or not at the time of the former trial or before it?
A. No, sir.
Q. When were you first consulted in regard to whether or not Mr. Peery was a stoop-shouldered man?
A. Well, I can't tell you when I was, really I can't tell you.
Q. Well, about when?
A. Well, I have been asked the question by Mr. Hoke if I had known Mr. Peery before-hand.
Q. Yes. Well, didn't Mr. Payne ask you before the former trial?
A. I don't remember of Mr. Payne asking me the question.
Q. Did Mr. Mitchell?
A. I don't remember Mr. Mitchell.
243 Q. Well, you remember the attorney, I mean?
A. I know Mr. Mitchell, but I don't remember his asking me that question.
Q. Well, who was the first man that asked you any questions about it?
A. Well, I suppose Mr. Payne was the first man.
Q. You say you suppose so—what is the fact?
A. Well, I couldn't tell you.
Q. What is your best recollection on the subject as to whether Mr. Payne asked you whether Mr. Peery was an erect man? And when I say erect I don't mean a man that walks up the way Mr. Hoke did with his stomach stuck out and shoulders back, but I mean an ordinary erect every day man; when were you asked about it the first time?

A. I don't remember when I was ever asked. I was asked since I have been in St. Paul about the condition of Mr. Peery's back, I remember Mr. Hoke asked me the question.

Q. That is all you can remember—is on this trial when Mr. Hoke asked you?

A. I remember Mr. Hoke asking, I don't remember whether Mr. Mitchell or Mr. Payne asked me on the other trial or not.

Q. But you had known Mr. Payne for a number of years?

A. Yes, sir.

Q. He had been claim agent there for a number of years before this accident had occurred, hadn't he?

244 A. Yes, sir.

Q. And it was his business when an accident occurred to look up the evidence, wasn't it?

A. Yes, sir.

Q. To interview all the witnesses so far as he could?

A. I suppose that is his duty, yes, sir.

Q. And he had interviewed you in regard to this case on some particular line of it before you came up here a year ago?

A. Yes, sir.

Q. Had talked with you about these train sheets, to bring them with you?

A. Yes, sir.

Q. And about that book in your lap?

A. Yes, sir.

Q. And discussed with you what you knew about the trains, and train orders and things of that sort?

A. Yes, sir.

Q. But you have no recollection of his ever asking you anything about whether Mr. Peery was stoop-shouldered or not?

A. I don't remember of any such question asked by Mr. Mitchell or Mr. Payne, either one. I was supposed to come up here with the train sheets and train records, to show how the orders was placed and how they was handled.

Q. How long had you known Mr. Peery as conductor?

A. Well, I don't know how long he had been a conductor,

245 but I know him ever since he has been a conductor, I have been in the service longer than he has.

Q. You were train dispatcher you say?

A. Yes, sir.

Q. At Fulton when Peery first began to operate through there, weren't you?

A. Yes, sir.

Q. And have been ever since?

A. Yes, sir.

Q. You would necessarily see him many times?

A. While he would be waiting there for a train he would come up in the office, like the other conductors do.

Q. Sure, he would come to you for your orders, wouldn't he?

A. No, sir, I would give them to the operator.

Q. I mean you saw him a good many times?
A. Yes, sir, I have seen him.
Q. But did you ever work around where he was working and doing his duties as conductor?
A. No, sir.
Q. You wouldn't know anything about just how he handled himself up and around cars and trains, and throwing switches and things of that sort?
A. No, sir.
Q. You understood he was a good conductor, didn't you?
A. Yes, sir, he was a good conductor.
Q. So far as you knew he did his work well?
A. Yes, sir; never knew of his having any trouble.
246 Q. But you do know enough about railroading, don't you, to know that conductors come up from brakemen first, don't they?
A. Like operators and dispatchers.
Q. Promoted?
A. Yes, sir.
Q. But I mean a conductor must first be a freight brakeman, mustn't he?
A. Yes, sir.
Q. And he must be a freight brakeman for a considerable period of time before he can be promoted to a conductor—is that right?
A. Yes, sir.
Q. You know enough about railroading to know that it requires a man in order to make a good brakeman and to qualify for a conductor to be an active man on his feet, don't you?
A. Yes, sir he has got to be a good——
Q. Yes, he has got to be right up and coming, hasn't he?
A. Yes, sir.
Q. A sluggish man seldom passes from brakeman to conductor on your road, does he?
A. We have got a load of them down there, I don't know how they got there, but we have a bunch of them.
Q. So you have some sluggish men down there that are conductors?
A. Yes, sir, we have.
Q. Sluggish men don't make good conductors, do they?
A. I am a dispatcher——
247 Q. Just answer my question.
A. No, sir.
Q. I know just how you feel about lots of the conductors, they cause you lots of trouble, don't they?
A. Yes, sir.
Q. They cause you lot of trouble and Peery was not a sluggish conductor, was he?
A. Peery didn't cause me any trouble.
Q. Now a freight conductor is necessarily required time and time again, on every trip, as you know, I take it, to get on and off moving trains; isn't that true?

A. Yes, sir, they have got to get on, they don't have to get on going fast.

Q. No, I don't mean fast, just as an illustration, it is a very, very common occurrence for a freight conductor to get his orders, and then catch on to his moving train as it is pulling out, isn't that true?

A. Yes.

Q. And he has got to get off from moving trains, moving at various speeds, under varied conditions, hasn't he?

A. He doesn't have to get off when the train is going when he can't get off.

Q. Oh, I know, I don't mean to break his neck, I mean when trains are moving along as distinguished from standing still?

A. Yes, sir.

Q. He has got to do it in the night time as well as the day time, hasn't he?

248 A. Yes, sir.

Q. Now, in regard to these orders, or some of them—let us dispose of 107 so we won't have any mistake here about it. Order 107 practically amounted to nothing did it?

A. Nothing, that is right.

Q. In fact an order—speaking now correctly—does not become an order until it is delivered to the persons to be controlled by it, does it?

A. That is correct; when it is annulled to the operator it does not go into effect.

Q. So 107 was annulled before it ever reached either Gorman or Peery, wasn't it, according to your record there?

A. Yes, sir.

Q. For if Peery had received 107 he would have signed it, wouldn't he?

A. Yes, sir.

Q. So we can leave that out of it. So that so far as the train orders are concerned, Robertson and Gorman never had any right to run first as distinguished from second 180, did they?

A. No, sir.

Q. Now then your orders also are of such a character that you can tell from them that Robertson and Gorman never had any information—from the orders, I mean—that the speed limit of 15 miles had been taken off Peery; that is true, isn't it?

A. That is true.

Q. It was your business as train dispatcher to be familiar with the duties of conductors in the operation of their trains

249 under orders, wasn't it?

A. Yes, sir.

Q. And it was Robertson's and Gorman's duty at all times to see that they did not run so as to overtake Peery's train—isn't that true?

A. Yes, they couldn't run around him, unless they——

Q. No, they couldn't run around him. Listen to my question:

It was Gorman's and Robertson's duty at all times to see to it that their train never overtook Peery's train, except at stations?

A. Yes.

Q. That is true, isn't it?

A. Yes, sir.

Q. In other words, as they were running at that time, under orders, it was Robertson's and Gorman's business to keep back and away from Peery's train at least ten minutes, wasn't it?

A. They have no way to tell the following train how close they are to the other train, except just by seeing them, only at open telegraph stations.

Q. I know. I will put it perhaps a little fairer way. It was their business to keep that space of time back of Peery's train, insofar as they could do so in the exercise of their knowledge that they obtained at stations and their judgment in running their train?

A. Yes, sir.

Q. Now, I understand from your testimony and other testimony that there was no night operator on duty north of Mayfield at this time?

A. Not between Mayfield and the accident, no.

250 Q. Now then, when Gorman and Robertson came to Mayfield, their testimony shows they pulled out a draw bar down south of Mayfield, and set out that disabled or bad order car somewhere at Mayfield,—you remember that?

A. Yes, sir.

Q. And that they pulled out another draw bar in Mayfield and had to set out that car also—you remember that?

A. Yes, the first one they pulled out was at Water Valley and the next one was south of Mayfield.

Q. Oh, yes, I got it wrong—one at Mayfield—that is right?

A. Yes, sir.

Q. Now, what was there in the course of practical railroading to prevent Robertson as engineer, and particularly Gorman as conductor, at Mayfield and before they went past the depot building, ascertaining from the operator at Mayfield when Peery left Mayfield?

A. They never do that.

Q. They never do it?

A. No, sir.

Q. Under the conditions existing in the operation of these two trains are they permitted by you as train dispatcher to run their trains through Mayfield, where you have no telegraph operators beyond for 15 miles, say, without inquiring whether they are nearer the other train than 10 minutes?

A. If they are nearer than 10 mintes, they will get a block
251 card before they get away from there. The conductor does not stop to ask. If the board is clear, they keep on going.

Q. Then, in the proper operation of the trains at that time, when Gorman and Robertson saw that the board was clear—that means that it had been dropped down——

A. Yes, sir.

Q. —and that you can pass. Did that mean anthing more to Gorman and Robertson than that Peery had gone 10 minutes?

A. It meant he had been gone 10 minutes or more, yes, sir—they knew that.

Q. But they had no right as conductor and engineer to assume that he had been gone 20 minutes?

A. Well, if I had been the conductor or engineer I would have.

Q. You would have assumed it?

A. Yes, sir.

Q. You would have assumed they had been gone for thirty minutes?

A. Figuring that the meeting point—that the train I had to meet at Mayfield met at Hickory——

Q. Where was the final meeting order for Peery to meet 1605?

A. To meet them at Mayfield.

Q. And he did meet them at Mayfield?

A. Yes, sir.

Q. Where was the place that Gorman and Robertson met 1605 and passed it?

A. At Mayfield.

252 Q. Then kindly explain to this jury in what way that would justify you in assuming that Peery had been gone thirty minutes?

A. I said twenty minutes, or more.

Q. Or, twenty minutes or more—tell why.

A. Well, it would take the train—the order I had received leaving Fulton would show that he met the train at Hickory and I met him at Mayfield and this fellow there in the side track could look down in the main track and see a clear board, he would naturally figure that the train had done left this other train because it was not anywhere in sight and the other fellow had gone.

Q. He would naturally figure that Mr. Peery met this train 1605 at Hickory, would he?

A. Why shouldn't he?

Q. He would, would he?

A. Why as far as I am concerned with my orders, I had no right to believe otherwise.

Q. Well, I am speaking of you now putting yourself in Peery's place—Peery's first order was to meet at Hickory wasn't it?

A. Yes.

Q. That was annulled, wasn't it?

A. Yes, sir; it was not annulled to Gorman the second man.

Q. It was annulled as to Peery?

A. Yes, sir.

Q. Would Gorman have any way of knowing from his orders as to 1605 as to where Peery was to meet it?

A. It was in the order, you know that Peery was to meet him at Hickory.

253 Q. In whose order?

A. In Gorman's order.

Q. What was in Peery's order?

A. Meet him at Hickory.
Q. Just read it.
A. Number 94.
Q. Read it.
A. Extra 1605 south meet first number 180; engine- 876 and 367 coupled, at Hickory, meet second number 180 engine 1603 at Mayfield.
Q. Signed by both conductors?
A. Yes, sir.
Q. Now what is the next order annulling that extra?
A. No. 99.
Q. Read it.
A. "First number 180, engine- 876 and 367 coupled, meet extra 1605 at Mayfield instead of Hickory."
Q. Signed by whom?
A. Peery.
Q. Is that a common condition and situation arising in railroading?
A. Yes, sir.
Q. Changing the orders at meeting points?
A. Yes, sir.
Q. Gorman was an old conductor, wasn't he?
A. Yes, sir.
Q. Now, you know that Gorman was perfectly familiar with the fact that meeting orders were changed right along on the run. weren't they?
A. Yes, sir.
254 Q. And if you were running as conductor you would have that knowledge in your mind, wouldn't you?
A. Yes, I would have that in my mind—sure I would.
Q. But notwithstanding, you would assume as a conductor—and as train dispatcher you are the man over all these conductors as to the running of trains, aren't you——
A. Yes, sir.
Q. You would assume, notwithstanding your knowledge, that meeting orders were constantly being changed, notwithstanding that it was not changed, and that Peery had met train 1605 at Hickory——
A. Well. he was going along there with two light engines, me with a heavy train; I would pull out two draw bars and be delayed 50 minutes; I come to Mayfield and I find an extra this man you are supposed to meet at Hickory, in the side track, the crossing is cut and the board clear, I figure this man had met the train at Hickory—him with a light engine and me with that train.
Q. Well, would you figure, as an experienced railroad man, or in what respect would you change your conclusion where you had found that Mr. Peery, who had left Fulton at 5:20 and your train left at 6:45—I think you said——
A. Yes, sir.
Q. —Gorman's train one hour and twenty-five minutes later, you run up to Water Valley, there you find Peery's train——

255 A. Yes, sir.

Q. Notwithstanding the fact that you have pulled out a draw bar and set out your car there, there it stands and both of you are waiting, then you see Peery pull out for Mayfield, would you still figure that you had a leeway of 20 minutes or more, when you got to Mayfield?

A. Well, if I hadn't seen him, if I had been on hand and hadn't seen him any more, I would figure he was away ahead of me, if I had been delayed by pulling out draw bars.

Q. Then, as you would run your train and engine thereafter from the point of Mayfield to the accident, how would you have managed if you had been in Robertson's place?

A. Run it in usual speed.

Q. And without regard to whether you could see ahead far enough so as to get your train under control if you would happen to see Peery's train?

A. How is that?

Q. Would you run it at such a speed around curves and where your view was obstructed so that it would be impossible for you to stop your train if you should suddenly see Peery's train ahead of you?

A. Well, I don't know that I would be under control any more than making the average speed across that track, that they make every day.

Q. Do you run passenger trains in first and second sections?

A. Yes, sir.

Q. The same way?

256 A. If it is necessary to run them.

Q. Do you run them in first, second and third sections frequently?

A. Not frequently, no.

Q. Sometimes?

A. Yes, sir.

Q. Space them about ten minutes apart?

A. Space them more than that.

Q. How much more?

A. Space them a telegraph office apart.

Q. So as to prevent collisions?

A. Yes, sir.

Q. But you take chances with freight trains, do you?

A. We haven't telegraph offices.

Q. I say you take chances with the freight trains and operate them in a sort of guess work fashion do you?

A. Not much guess work on my part of it.

Q. Oh no, but I have still got you as a conductor, as an experienced conductor; that is the way you would operate, isn't it?

A. I wouldn't do much guessing.

Q. Now, let me ask you this question: As an experienced railroad man, if you had been running that engine of Robertson's, you would have run that train so you could have stopped at any time, if at

any time you suddenly saw Peery's lights ahead of you—now wouldn't you?

A. Why, I would make the usual speed as they all do; I don't see any reason why I——

Q. You are the one representing the Illinois Central as to
257 the method and mode of operations there aren't you?

A. Yes, sir.

Q. As train dispatcher?

A. Yes, sir.

Q. And you want to be understood that that is the way you carry on the business down there, is it?

A. I carry it on just as near as I can correct.

Redirect examination.

By Mr. Hoke:

Q. Now, if as a matter of fact, still assuming that you are an experienced conductor, you had been in Peery's place, and his train instead of running 20 or 25 miles an hour or making what you call usual speed down through Camp Creek there, was in fact running very much more slowly than that, or had for a time stopped so that the cupola light had been turned around red, what would you, as an experienced conductor in Peery's place, have done to protect the rear of your train from collision with Robertson's?

Mr. Anderson: I object to the form of the question on the ground that it assumes something that is not in this case and has not been established—and I think I am safe in saying in assuming that you won't prove it.

Mr. Hoke: It is a proper inference from the testimony of your own witness, Mr. Robertson, who says that the cupola light was turned red, showing that Peery's train was either stopped or had greatly reduced the speed.

258 Mr. Anderson: Did he say so?

Mr. Hoke: Yes, he did—your witness said it.

Mr. Anderson: He said the light was red?

Mr. Hoke: Yes.

Mr. Anderson: I object to the question on the ground that you are assuming something that is not shown in this case and there is not a word of evidence to show it.

The Court: Of course it must appear in the case—I don't know.

Mr. Anderson: I will withdraw the objection, go ahead.

Q. Now to make the question possibly shorter: What ought Peery to have done if in fact his train was running at greatly reduced speed, or was standing while they were in Camp Creek bottom, knowing that there was a second section following?

A. He should turn his cupola light if he had reduced speed greatly, and if he had stopped he should have sent out a flag to protect the rear of his train.

Q. Send out a flag?

A. Yes, sir.

Q. Was there any other way to do it—in respect to fusees?
A. Why, if he was figuring on stopping at the creek or around a curve somewhere, he would want to throw off a fusee before he got around the curve.
Q. What is that?
A. I say if he was going to stop around the curve—if I
259 was conductor, and was going to stop around the curve, I would throw a fusee off before I got around the curve.
Q. When you left the straight track you would throw off one of these red fusees or yellow one?
A. If I was going to stop anywhere.
Q. That is what Mr. Peery ought to have done, isn't it?

Mr. Anderson: You mean, ought to have done under what circumstances?
Mr. Hoke: Under the circumstances as we claim them to have been.
Question not pressed.

Recross-examination.

By Mr. Anderson:

Q. Now you say that if he was going to reduce speed, he would turn the red light in his cupola, is that right?
A. Yes, sir.
Q. Why?
A. Well, that is the rule.
Q. I know, but what for?
A. If the train was following me, he would know that I had reduced speed and that would make him reduce speed so that he would not run quite so fast as I was, and gradually gain ground on me and run into me.
Q. That is it, the red light in the cupola would be turned for the purpose of warning Robertson that he was slowing down and running slow so that Robertson would not run into him, isn't that right?
260 A. That is what it is for.
Q. On the last trial I asked you these questions, speaking of the limitation of speed in order 87: "Q. I am asking you to tell us what that language meant to Robertson." (The 15-mile limitation of speed.) "It meant for him to keep a lookout, didn't it?" Didn't you answer "It meant just what it said." "Q. It meant for him to keep a lookout, did it not?" (By Robertson.) "A. I suppose it would." Do you remember of answering that way?
A. I don't remember that far back.
Q. Well, then, I will put it in this way, I will put you the question now, didn't it mean to Robertson for him to keep a lookout?
A. It meant for the first man to run 15 miles per hour.
Q. Not to exceed that?
A. Not to exceed that; it didn't mean for Robertson to do that.

Q. I didn't say that, my question was, it meant for Robertson to keep a lookout for that train, didn't it?

A. Well, I suppose it would, yes.

Q. Well, that is just what you said here, "I suppose it would," that is the language.

Q. (Reading:) Q. You know as a train dispatcher, don't you, it is your duty as a train dispatcher, to know, is it not?

A. Yes, sir. The way I would take it if I would get the order.

Q. Here is the one I had in mind: "Q. In other words, Robertson, as engineer, when he received that order (this is 87
261 now, understand—you know what I mean, 15 miles——)

A. Yes.

Q. —"and started out from Fulton, was bound to run his train expecting to overtake Peery at any time that he (meaning Robertson) exceeded fifteen miles an hour; isn't that true?" Did you not answer that question "Yes, sir?"

A. I guess I did if it is there.

Q. That is true, isn't it?

A. Yes, sir.

Redirect examination.

By Mr. Hoke:

Q. Now was that 15 mile's limit a limit on Robertson?

A. Not on Robertson, no, sir.

Q. Suppose Robertson should have been delayed two hours or we will say half a day, could he still be limited by that order, to 15 miles an hour?

A. No, sir; train orders have got to mean just letter by letter what they say, a conductor or engineer cannot take an order to mean something else—we would have collisions. We mean just exactly letter by letter what we say.

Q. The order, then left Robertson to use his own discretion, after he stopped he could make up to the limit of his engine's speed, considering the length of time that he was delayed, and whether he saw Peery ahead, etc.?

A. He signed the order—Mr. Gorman did—the first thing they do when they get the order, they look on the register to see if
262 the first man has gone, and the second could not leave until he had known that the first section had gone, and to see whether or not he had registered out with green signals indicating that there is a man following him. If he did, then some other train would overlook Robertson and consequently a collision that way. And Gorman steps out and checks the register and sees where these fellows had gone.

Q. Suppose he saw that they had gone at 5:20 and he left at 6:45——

Mr. Anderson: An hour and 25 minutes.

Mr. Hoke: An hour and 25 minutes.

Q. Now, under those circumstances, was he bound not to exceed a speed of 15 miles an hour from Fulton to Water Valley?
A. Robertson?
Q. Yes.
A. No, sir.
Q. Was he bound to anticipate that he would overtake Peery between Fulton and Water Valley if he ran at a speed in excess of 15 miles an hour?
A. No, sir, not unless he had a regular blocking and regular protection leaving that much apart.
Q. But leaving Fulton an hour and a quarter after Peery, he was not bound to anticipate he would run into Peery if between Fulton and Water Valley he exceeded a speed of 15 miles an hour, was he?
A. No, sir, he would not expect it.
Q. Isn't it a fact that all second sections have to look out for first sections?
263 A. Yes—just as Mr. Robertson said—they had to look out all the time.

Adjourned until the morning of February 20th.

Mr. Hoke: I offer in evidence defendant's exhibit 2, which is a little map of a portion of the state of Kentucky.
Received without objection.
Mr. Hoke: Now, in connection with the map which at this trial has been referred to as Dtf't's Ex. 1, I desire to read the testimony of division engineer, John M. Hoar, who testified at the last trial in connection with this particular map.

JOHN M. HOAR, sworn as a witness on behalf of defendant, testified:

By Mr. Mitchell:

Q. What is your full name?
A. John M. Hoar.
Q. And where do you reside, Mr. Hoar?
A. Fulton, Kentucky.
Q. What is your occupation?
A. Civil engineer.
Q. Are you employed by the Illinois Central Railroad at Fulton, Kentucky?
A. Yes, sir.
Q. In what capacity?
A. Division engineer of the Tennessee division.
Q. That is the division that runs between what points?
A. Cairo to Birmingham and Memphis to Paducah.
264 Q. That includes the line between Fulton and Paducah?
A. Yes, sir.
Q. Are you familiar with the road-bed and right-of-way of the railroad between the stations of Mayfield and Krebs on that division?
A. Yes, sir.

Q. Now, at defendant's request you have prepared a map, have you, Mr. Hoar, of this part of the line from a point just north of Mayfield to a point beyond Boaz where this accident occurred?

A. Yes, sir.

Q. I show the witness now Def't's Ex. 3, which is the same map that was referred to in the cross-examination of Mr. Peery, and ask you to state if this is the map as you prepared it?

A. Yes, sir.

Q. On what scale is this map drawn?

A. 300 feet to the inch.

Q. Does it correctly show the line of railroad from a point just north of Mayfield to Paducah?

A. Yes, sir.

Q. And especially the part between Mayfield and Krebs on which strip this trip was made on the 8th of December, 1911?

A. Yes, sir.

Q. Is that a correct map?

A. Yes, sir.

Q. What have you got indicated on here? I notice, for instance, there are pictures along the line of the road here, it looks like a picture of a milepost with numbers on it, L246, L245, etc. What do those represent?

265 A. They are miles from Louisville, Kentucky.

Q. And the mileage is measured south here, is it?

A. Yes, sir.

Q. So that each one of these mile-posts as they are placed on this map indicates a mile along the track, is that right?

A. Yes, sir.

Q. What do these figures on the red line, which is outside of the map, upon the outer edge of it, the red line with figures on it——

A. It shows the grade line of the track with the elevations marked on them above sea level.

Q. Those figures represent the elevations above sea level, do they?

A. Yes, sir.

Q. So that by reference to these figures you can tell whether there is an upgrade or downgrade and how big it is?

A. Yes, sir.

Q. Does this black line that runs through the center of the map correctly represent the track?

A. It represents the direction in which the track runs.

Q. Each direction, including the curve?

A. Straight line and curve.

Q. I notice a point which is marked Viola; what is that?

A. That is a small town called Viola, station, flag stop for train.

Q. And another point marked Boaz; what is that?

266 A. That is another station.

Q. I notice a point here marked Camp Creek which appears to be north of Boaz.

A. Yes, sir.

Q. How far north of Boaz is that?

A. Camp Creek is about four miles north of Boaz.

Q. What is the condition of the track with reference to the curves and cuts and so on between the mile-post L237 and mile-post L235 which includes the district in which Camp Creek is located?

A. Well, from L237 mile-post there is a curve running 2,900 feet long, and then a piece of straight track 2,429 feet, and then we have a curve again at 2,797 feet to the left and a short piece of straight track 1,350 feet long, and then a very small curve, light curve, 758 feet long, and a moderate curve in there.

Q. The curves that you have described are commencing on the south are they?

A. Yes, sir.

Q. And running north?

A. Running north.

Q. Do you know whether that road goes through a cut there or whether it is open?

A. Well, the first curve I mentioned from north of mile-post L237 is in a cut and it runs down grade then on to a fill through here over Camp Creek, what they call Camp Creek bottom, and then getting over here nearly to the next mile-post it starts in up grade into a cut again.

267 Q. How long a piece of straight track is there just south of where this curve commences, south of the curve near mile-post 237?

A. Well, the straight piece of track south of there is 3,900 feet, and then a very short curve, and then another long piece of straight track.

Q. What is the distance of that straight piece of long track, commencing near mile-post 239 and running south?

A. 239, running south the straight piece of track is something over three miles—about three and a half miles, nearly three and a half miles.

Q. Will you commence at the Mayfield end there and just give us the general description of the grade, not in detail, but in a general way. The map shows the details?

A. Well, starting out of Mayfield we have a long piece of straight track about six and three-quarters miles long and which is down grade, all the way from Mayfield to a point beyond Boaz.

Q. Commencing then at this point just beyond Boaz?

A. Commencing at this point just beyond Boaz we have a gradual up grade, a slight up grade. It goes up for about half a mile, as I remember it. It shows there a slight up grade, over a level piece and then down grade again.

Q. Where does the down grade commence, how far beyond Boaz?

A. Just about two miles north of Boaz the down grade starts again.

Q. And it runs down grade then——

268 A. Down grade until after you cross Camp Creek.

Q. So with the exception of that one place that you spoke of, the general grade is downward, or in some spots on a level, is that right?

A. Yes, sir.

Def't's Ex. 1 introduced in evidence without objection.

DOUGLAS MURPHY, sworn on behalf of defendant, testified:

By Mr. Hoke:

Q. Where do you live, Mr. Murphy?
A. Now?
Q. Yes.
A. Vina, Alabama.
Q. What is your business?
A. Agent for the Illinois Central.
Q. Where did you live when this accident happened?
A. Mayfield, Kentucky.
Q. You were then agent for the company at that place?
A. Yes, sir.
Q. You were here at the last trial, were you?
A. Yes, sir.
Q. You have been over this matter more or less?
A. Yes, sir.
Q. You remember these trains, first and second 180?
A. Yes, sir.
269 Q. We call them Peery and Gorman's and Peery and Robertson's?
A. First and second 180.
Q. Now just tell the jury briefly, what transpired at your station with respect to the time of arrival of those trains, the orders they received and the time of departure from Mayfield going north?
A. I don't remember the exact time they arrived there without consulting my train register.
Q. You have a station register?
A. Yes, sir. (Looking at book.) First 180 engines 86 and 367 (which was a double header) arrived at my station at Mayfield at 8:30 p. m.
Q. December 8, 1911?
A. Yes, on December 8th, and departed from there at 8:50 p. m. They consumed about 15 or 20 minutes there setting out a pile-driver and outfit in the Mayfield waterworks track.
Q. What was that pile driver subsequently used for?
A. Well, it is for——
Q. No, I mean what work did they do with the pile-driver there at Mayfield upon the occasion of its being there at that time
A. I think they drove some piles in the spur track.
Q. What is the name of that track?
A. The Mills Spur, I believe they call it.
Q. Where did that Mills Spur lead to?
A. It intersected the main line just north of the station—of the depot.
270 Q. And led to what mill?
A. Kebil's mill, I believe.
Q. Was that the only industry on that track?
A. Yes, I believe it was.
Q. What did they manufacture at that mill?
A. Flour.

Q. Do you know what was the occasion of the work that the pile driver did on that track?

A. No, I don't.

Q. What was the details of the work being done?

A. I don't know, I don't remember; I just remember they went down there and did some work on that track.

Q. Something in connection with the drainage of water there?

A. I believe it was.

Q. You say that first section 180 arrived there at 9:30?

A. Yes, sir.

Q. Now tell us, if you recall, about the orders that you received and delivered and all that was done there in respect to orders for that train?

A. Well, it seems to me like first 180 after setting out this pile driver and outfit, came to the office, and told me to tell the dispatcher that they had set the pile driver out and could resume usual speed—which was with this class of engines I think, thirty miles an hour—and it seems that they had been restricted, but he could resume usual speed, and I notified the dispatcher to that effect; and

271 I can't recall all of those orders from memory right now, it has been so long since.

Q. There is no dispute about them, so we can help you out. The first order you received was so called 107, which directed engine 1603 and engines 876 and 367 coupled to reverse positions as first and second number 180 from Hickory to Paducah yard; you received that, did you?

A. Yes, sir.

Q. And then you got this information from the crew to the effect that they had set out the pile driver and they didn't want to reverse positions?

A. Yes, sir.

Q. And then you got this order, 109, which read as follows: "Engines 876 and 367 coupled, display signals, and run as first number 180 Mayfield to Paducah yard."

A. Yes, sir. That order was put out after the dispatcher had gotten this information that they could resume usual speed.

Q. Yes, and in the meanwhile did you do anything about ascertaining where the second 180 was?

A. Well, when Mr. Williams started to put this reverse position order out, before he would put it out, he asked me to go to the door or to the platform and see if I could hear or see them coming and I stepped out and didn't hear them anywhere, and came back and told him they were not in sight and then he cancelled this first position.

Q. That is, you were looking for the second section?

A. Yes.

272 Q. To look for Robertson and German?

A. Yes.

Q. Now look at that book there and tell us when Mr. Perry's crew left Mayfield, going north?

A. Mr. Peery's first 180?
Q. Yes.
A. He left there at 8:50.
Q. Now, when Mr. Robertson's crew (the second 180) came through Mayfield, did they stop?
A. No, sir, they didn't stop at the station directly.
Q. How about the board, as they call it, the signal board?
A. That semaphore board was clear when second 180 passed it. What we mean by clear is, it was displaying a green light.
Q. Were you in control of that board?
A. Yes, sir.
Q. Just explain the use of that board as applicable to circumstances similar to these.
A. Well, it is used for the governing of trains; what we call blocking them, it is spacing them ten minutes apart, unless otherwise directed by the dispatcher; that is what it was used for on that night.
Q. What time was it when Robertson came through there?
A. He passed through there at 9:10.
Q. Twenty minutes after Peery?
A. Yes, exactly 20 minutes.
Q. Was there any other train on the side track there, or don't you know?
273 A. There was an extra going south on the siding there, arrived at Mayfield at 8:12 p. m. and departed at 9:20, ten minutes after Peery went north.
Q. Did you deliver any orders to Robertson or his crew—the second section.
A. The second 180? No, sir, nothing at all.
Q. Did you know Mr. Peery before this accident?
A. Yes, I have been working with him there on the road for—I believe the first recollection I have of Mr. Peery was along about 1907, possibly 1908; I was working at Fulton at the time.
Q. How often did you see him?
A. Well, when I first knew him, he was running extra over there and flagging, and I didn't see him so often, didn't pay so much attention to him, but after he went to running, the last year or two that he was down there, why I saw him frequently.
Q. How long were you at Mayfield?
A. Five years.
Q. Now, as you observed Mr. Peery, and knew him prior to this accident, what have you to say whether he was an erect man, or a noticeably stooped man in his carriage?
A. I don't know that Mr. Peery could have been called an erect man by any means, but I have seen men that were equally as bad or worse stooped.
Q. Can you illustrate in any way the manner of his carriage?
274 A. No, I don't know as I can.
Q. Did he walk with his head back or forward or shoulders up, or was he round backed or what?

A. I would have always considered him a stoop-shouldered man—round-shouldered is what I mean.

Q. Just try to describe to the jury your recollections of Mr. Peery as you saw him there those years.

A. To the best of my recollection he always carried himself in a more or less stooped position and head a little forward.

Cross-examination.

By Mr. Anderson:

Q. You were not asked any questions as to whether he was stooped or not when you were here last January, a year ago, were you?

A. I don't think I was.

Q. But you came up here at that time with Mr. Payne, the claim agent?

A. Yes, sir; I didn't come with him, I came after they did several days; I was here at the trial.

Q. He had seen you and talked with you, or course—Mr. Payne, the claim agent?

A. You mean before the former trial?

Q. Yes.

A. I declare I don't know whether he ever mentioned it to me before the former trial or not.

Q. Who talked with you in connection with the annulling of order 107? I mean who of Perry's crew.

275 A. Order 107?

Q. That is the one you annulled, about reversing the positions of the two sections. You said the crew came up to you and said they could make their usual speed and Williams told you then to annul it and issue 108?

A. Yes.

Q. Who talked with you?

A. I am almost positive that it was Mr. Peery.

Q. Well, let us refresh your memory a little bit. Your name is Douglas D. Murphy, isn't it? At the former trial you were asked this question—well there were questions running along about orders and then the question: "Q. That is, the order transposing, reversing positions, you mean? A. I had this order reversing their positions from Hickory." I am now reading your testimony as it was given under oath. "I don't know what the number of it was, but after they had set the pile driver out, the engineer came in and told me to have that order taken up, that they could make the usual speed. I notified the dispatcher and he did so." Now, if you testified that way a year ago January, it was undoubtedly true and correct, wasn't it?

A. Well, possibly so, it could have been the engineer that talked there.

Q. You swore there without hesitation that the engineer said this to you. Now you were telling the facts as they existed at that time, weren't you?

A. I was trying to, yes, sir.

Q. And your memory probably on that subject was better
276 a year ago than it is now, I take it.

—. ——.

Q. Then you were asked the question: "Q. Did you have any conference with Mr. Peery there or any talk with him about it? Did he come in for orders? A. No, he wasn't in the office at that time." Did you so answer?

No answer.

Q. You did so answer, of course, that is correct, isn't it, as you remember it now after refreshing your memory?

A. If I made that statement there, it is correct.

Q. Well, you made it, there is no question about that—I suppose, is there?

Mr. Hoke: No, not at all. It is an immaterial matter.

Redirect examination.

By Mr. Hoke:

Q. Now, following those questions at the last trial I asked you: "Q. Did he come in afterwards? A. He was coming down the platform, he came in afterwards. Q. Did you show him these two orders? A. Which two? Q. The ones I have just referred to. Did you have any talk with Mr. Peery about the change in the orders? A. As well as I remember of reversing their positions, was annulled to me before he signed it." So that this order 107 was annulled before Mr. Peery signed it?

A. I don't have any recollection of him signing 107.

Q. Now, I don't know as it makes any difference whether Mr. Peery was there or not. Do you now recall whether he was
277 there or not, whether he was there when you had this talk about reversing crews?

A. I was under the impression that Mr. Peery was there, but it is possible that he was not. Frequently engineers come in and give us this information on account of them being on the head end.

JAMES W. GORMAN, sworn on behalf of defendant, testified:

By Mr. Hoke:

Q. Mr. Gorman, were you the conductor of Mr. Robertson's train, known as second 180?

A. Yes, sir.

Q. I won't trouble you to ask you what happened at Fulton, but when you got to Water Valley, was the first section there?

A. Yes, sir.

Q. Did you leave right after they did?

A. Well, I started to.

Q. What happened?

A. Pulled a draw bar out of the car.

Q. Did you have to set the car out?

A. Yes, sir.
Q. How long did that delay you, about?
A. Between 25 and 30 minutes.
Q. Then did you go on north?
A. Yes, sir.
Q. Anything happen before you got to Mayfield?
A. Yes, sir.
Q. What happened?
278 A. Pulled a draw bar about a mile and a half south of Mayfield.
Q. On a hill there?
A. Yes, sir.
Q. Was that set out?
A. Yes, sir.
Q. How long did that delay you, about—about the same length of time?
A. About thirty minutes I guess—25 or 30 minutes.
Q. Then your train went on into Mayfield?
A. Yes, sir.
Q. And through?
A. Yes, sir.
Q. Did you get any orders at all at Mayfield?
A. No, sir.
Q. Did you see the first section of 180 at all after you left Water Valley?
A. Not after I left Water Valley, no.
Q. Where were you riding on the train, what part of the train?
A. The caboose.
Q. What was the first notice you had that anything unusual had occurred?
A. When we had the collision.
Q. Yes, when you had the collision——
A. Why, I just felt a jar, it knocked me out of the seat in the cupola of the caboose.
Q. Have you any recollection as to whether your train was running at ordinary or at extraordinary speed?
A. Just an ordinary speed.
279 Q. Just before the collision?
A. Ordinary speed.
Q. And that would be about how many miles per hour?
A. Well, I suppose we was going along there at something like between 20 and 25 miles an hour.
Q. Did you go ahead to see what was wrong after the collision occurred?
A. Yes, sir.
Q. Do you know what time it was that the collision occurred?
A. About 9.35.
Q. How do you happen to know the time?
A. Looked at my watch.
Q. Did you know Mr. Peery before this accident?
A. Yes, sir.

Q. Just tell the jury how well you knew him?

A. Well, he flagged for me probably a couple of years before he was promoted.

Q. What does that mean? How intimately would that bring him into association with you?

A. Well, we was pretty near, you may say, continuing in the caboose together when we was making the trip; he was braking behind for me—we call them flagmen down there.

Q. Now tell the jury about your recollections of him, as to whether he was a noticeably erect, spry man, or otherwise. In his ordinary daily life?

A. No, sir, I would not call him an erect man.

Q. What would you say about him?

280 A. He was what I would call a stooped or round-shouldered person.

Q. Just describe him to the jury. You understand what we are in dispute about here, the jury want to get a picture of it.

Q. Well, he was what I would call a stooped, round-shouldered man, carried his head in a little forward position.

Q. How about his shoulders?

A. Well, I say stooped or round-shouldered, whichever you might want to call it; his neck seemed to be short that way (indicating).

Q. You just then shrugged up your shoulders.

A. Yes, sir—neck kind of short.

Q. What about the way he walked?

A. Well, he walked about like I would do, I guess; he wasn't in a very big hurry. I didn't see nothing extra about his walk;—just an old everyday walk.

Q. I neglected to ask you whether this fellow Warford, Peery's flagman, was hurt in that wreck?

A. He told me that he wasn't hurt when I asked him; he was the first one I saw of the crew.

Q. Did he help you get Peery around there?

A. He assisted us in getting Mr. Peery and the brakeman both on the engine.

Q. How long after the collision occurred did you get there? To the point of the collision?

A. Well, it was just a few minutes. I got right down out of my caboose and walked over to the head end of my train; I had 53 cars, I believe.

Q. About how many minutes would that be?

281 A. Well, I suppose something like five minutes.

Q. Did you have any talk with Warford then?

A. I met Warford right at the head end of my train when I got up there.

Q. What was said then?

Mr. Anderson: I don't think that is material—what was said. Mr. Warford can come here.

Mr. Hoke: Well, he won't tell.

Mr. Anderson: He is in your company's employ. You still keep him in your employ, at any rate.

The Court: You can bring him here as a witness. Objection sustained.

Mr. Hoke: I offer this as a part of the res gestæ. And don't want to make a statement now so the jury will hear it.

Mr. Anderson: Objected to upon the ground that it would not be res gestæ and objected to upon the ground of hearsay testimony at best.

The Court: Objection sustained.

Mr. Hoke then made the following offer without the hearing of the jury.

That in response to the foregoing question the witness would say that immediately upon his coming up to the place of the collision he asked Warford, the flagman of Peery, what they were doing when the collision occurred, and Warford said that he and Peery were playing Pitch.

Mr. Anderson: I object to that on the ground of hearsay.

The Court: Objection sustained.

282 Q. You heard the testimony of Mr. Peery to the effect that when they left Fulton with this engine 367 under steam and with a fireman and engineer on it, on their way to Paducah, Mr. Peery got a waybill covering the engine, a waybill for Paducah. Now did you ever hear of a waybill being issued under those circumstances?

A. No.

Q. Did you see Mr. Peery last summer in Paducah?

A. Yes, sir, several different times.

Q. What have you to say as to whether, as you observed him last summer, he appeared to walk with as much or more or less difficulty than he does here in St. Paul?

A. Well, now, I don't know now that I could say that, because I never noticed Mr. Peery walking the most of the time that I would see him, I would be either coming in or going out, and he would be over on his little porch there, not far from the railroad, and I would either holler at him—I believe I was over there a couple of times. As my flagman and myself was going out he called us over there and gave us a bottle of soda water or something of the kind.

Q. So you don't know anything about that?

A. No, sir.

Q. You have been on very friendly terms with Mr. Peery?

A. Oh yes.

Q. You are now?

A. Yes, sir.

283 Cross-examination.

By Mr. Anderson:

Q. When you were here a year ago last January you heard all the trial, didn't you? Heard all the talk, practically?

A. Well, on this side, yes.

Q. Yes, on the defendant's side. Now, as a matter of fact, at the

time you were here, the defendant had present as witnesses and had them sworn, Mr. John M. Hoar?

A. Yes, sir.

Q. The division engineer. Herbert W. Williams, Douglas Murphy, John E. Shelton and yourself—do you remember?

A. Yes, sir.

Q. You also remember, do you not, that you were the only man from whom the defendant attempted to elicit any evidence whatever as to whether Mr. Peery, before the accident, was stoop-shouldered or not? Isn't that true?

Mr. Hoke: That is objected to as involving a criticism of Mr. Mitchell, who tried the case before, for not availing himself of the evidence at hand. If there is any doubt about it, we will wire down to Paducah and get 25 of them.

The Court: I suppose they may show whether these witnesses were asked that question or not.

Mr. Anderson (to Mr. Hoke): It is a fact, isn't it?

Mr. Hoke: I don't remember; I haven't checked it up. If you say it is a fact, I will admit it.

Mr. Anderson: It is a fact.

284 Mr. Hoke: Whatever you say about the record, I will accept.

Q. You were questioned on the subject as to whether he was stoop-shouldered or not at the last trial, weren't you?

A. Yes, sir.

Q. I am going to read your testimony that you gave at that time and ask you if it is correct as you remember it, as you remember the fact as to his physical appearance. (Reading) "Q. You have known Mr. Peery for some time, have you? A. Yes, sir, a good while. Q. How long? A. Well, he flagged for me about three years, and I guess I have known him something like seven or eight years. Q. Will you tell us what Mr. Peery was like before this accident with reference to having this stoop in his shoulders, or was he straight?" A. Well, he walked a little stoop-shouldered." That was your answer, wasn't it?

A. I think it was.

Q. That is true, as you remember it?

A. Yes, sir.

Q. And it is a very common occurrence in your experience when you are around among railroad men to find them a little stoop-shouldered, isn't it?

A. Well, no more than any other class of people I know.

Q. You see lots of people who are a little stoop-shouldered, don't you?

A. Yes, sir.

Q. That is what you meant when you said he was a little stoop-shouldered?

285 A. That is what I meant when I said it, yes, sir.

Q. I just want to get at the exact thing you have in mind. "(Reading) Q. Had he always done that? A. Yes, sir. Cross-ex-

amination. Q. Any more so than you do? A. I don't know how much I am. Q. You have seen yourself as much as you have seen him, haven't you? A. Oh, yes, and more, too. Q. Then you are better—— A. He walked a little stoop-shouldered." You again use the word little, don't you? (No answer.) "Q. Any more than you do? A. I don't think I walk stoop-shouldered. Q. Anything noticeable at all, the way he walked? A. What do you mean? Q. I mean he was not stoop-shouldered any more than the ordinary, average man, was he? A. I say he was a little stoop-shouldered."

Q. That is the testimony you gave on the former trial, isn't it?

A. I think it was.

Q. That is what you mean now, isn't it, is that right?

A. Yes, sir.

Q. Now you say the first you knew of the collision was when you were knocked out of your cupola chair?

A. Yes, sir.

Q. Did you go down to the floor below?

A. No, sir; I was sitting in the cupola with my feet up on the wall, this way, and it just shoved me out of the chair.

Q. Feet towards the north?

286 A. Yes, sir.

Q. It must have been a pretty hard shock, I take it.

A. Well, I wouldn't call it any more than an emergency application of the brakes; we had a long train.

Q. Was there any shock came after that?

A. No, sir, I don't think there was.

Q. That is, you don't remember of feeling any shock at all after this one shock that slid you forward on that chair?

A. No, sir, I do not.

Q. Now, you went up to the head end of your train after the accident?

A. Yes, sir.

Q. Where did you find Peery's engines in his train?

A. Well, I suppose there was about—I don't know, 8 or 10 car lengths ahead of where mine was stopped, something like that.

Q. Had the crews of those engines come back to the scene of the accident when you got there?

A. Yes sir; they were around Mr. Peery.

Q. So there was an open space between your engine and their engines of seven or eight car lengths?

A. Yes, sir, something like that.

Q. And the trucks of the caboose were hanging on to your engine, I take it—some of them, at any rate?

A. Well, yes, sir. Well, just kind of elevated on the pilot.

287 Q. And most of the caboose was scattered along the right of way?

A. Yes, sir.

Q. And did you notice how far back along the side of your train you found portions of the caboose?

A. Well, I suppose, Mr. Anderson, it must have been about six or eight cars, something like that.

Q. So that indicated to you, from the way the wreckage was scattered along, that your engine had run at least that distance after striking the caboose?

A. Yes, sir.

Q. Where did you find Peery with reference to your engine, or had he been moved when you got there?

A. No, sir, he had not been moved, I don't think.

Q. Well, how far back was he from your engine?

A. I believe he was right opposite my engine. It seems to me he was right about opposite my engine.

Q. Indicating to you that he had been carried by your engine?

A. Yes sir.

Q. In other words, from the way you examined things and the way things looked, how did Peery ever get up there?

A. Well, I don't know how he got up there unless he was knocked up there.

Q. Well, of course, we will take it for granted that he went
288 along some way with the wreckage, that is what I mean. Peery was, you say, up about to your engine?

A. It seems to me like he was about opposite my engine, yes; he might have been a little behind my engine.

Q. And the caboose, you found the caboose ranging along from 8 car lengths back south of your engine, clear up to and upon the front of your engine?

A. Six or eight car lengths, back, I guess, yes, sir.

Q. How far is it from Mayfield station to the scene of the accident? I mean where you found the first pieces of the caboose.

A. Well, sir, something like 13 miles.

Q. The accident occurred at 9:35, is that right?

A. Yes, sir.

Q. When did you look at your watch, what time in the course of this——

A. As soon as I got straightened up in the caboose.

Q. Well, how soon did you get straightened up after you slid out of your chair?

A. Just as soon as I could pull myself back.

Q. You pulled your watch out because as conductor you would be required to make a report?

A. Yes, sir.

Q. The record shows that you left Mayfield at 9:10, so you ran 13 miles in 25 minutes, didn't you?

A. Yes, sir.

Q. How fast were you running, miles per hour?

289 A. Well, something between 25 and 30 miles.

Q. Well, if you ran 13 miles in 25 minutes, you would run 26 miles in 50 minutes, so then you ran over 26 miles at any rate, didn't you?

A. I say something between 25 and 30 miles.

Q. In order to get at your speed, you will have to add one-sixth to 26, which is a little over four, so that you really were running,

according to that estimate, at least thirty miles an hour, weren't you? I mean the average from Mayfield out.

A. Something like that, yes.

Q. That is right, isn't it?

A. Yes.

Q. But at the time this accident occurred, you were going down a long hill, weren't you?

A. Well, we had just went down a long hill and just started up an elevation.

Q. But I mean your train was on the down grade?

A. My train was, yes, sir.

JOSHUA EARL SHELTON, sworn on behalf of defendant, testified:

By Mr. Hoke:

Q. Are you now employed by the Illinois Central?

A. Yes, sir.

Q. In what capacity?

A. As fireman.

Q. Running where?

A. Between Paducah and Memphis, Tennessee.

Q. Were you Mr. Robertson's fireman on second 180 at
290 the time of this collision?

A. Yes, sir.

Q. Do you remember whether you pulled out a draw bar at Water Valley that night?

A. We did.

Q. You have heard the testimony of Mr. Robertson and Mr. Gorman, about your pulling out draw bars, at Water Valley and at Mayfield, and possibly we can save time if I ask you whether their testimony with respect to those matters, substantially accords with your own recollection of what occurred?

A. Yes, sir.

Q. Did you see the caboose before you struck it?

A. Yes, sir.

Q. Where were you sitting?

A. I was sitting on the seat on my side in the cab window.

Q. Now just tell the jury what you did, just talk to them now and tell them what you know about that collision.

A. I didn't do very much. About the first thing I did I hollered to Mr. Robertson. I don't know the words that I said to him, I might have hollered "jump off" or "stop" or "go ahead," I don't know what I hollered. And the next thing I done was looking out for myself, I got behind the boilerhead, so the timbers would not strike me.

Q. Where did you get?

A. I got right down, you might say, right in front of the
291 fire-box, right in behind the boiler head.

Q. And do you remember how many lights you saw?

A. No, sir.

Q. Did you see anything but red?

A. No, sir, red lights was all I saw.
Q. And do you remember seeing a green light at all?
A. No, sir.
Q. You had not been firing very long at that time had you?
A. Well, something about ten months; since the 21st of January.
Q. Was there anything about the speed of your train at the time, out of the ordinary, so far as you have any recollection about it?
A. No, I couldn't tell anything unusual.
Q. You have no recollection that the speed was extraordinary at all?
A. No, sir.
Q. Well, did you know Peery before the accident, or didn't you know him well?
A. Well, I knew him, but then to say to have any acquaintance with him, I didn't have very much, just saw him there on the road working.
Q. Have you any recollection about the way he carried himself?
A. No, sir, I have not.
Q. You don't know him well enough or see him often enough to have any recollection about that?
A. No, sir.

292 Cross-examination.

By Mr. Anderson:

Q. Well, how often did you see him?
A. Well, maybe I would see him once a week, and maybe I would see him two or three times a week; I was working extra, and he was working regular.
Q. You saw him a good many times, of course?
A. Yes, I saw him several times.
Q. You saw him many times, didn't you, in ten months?
A. Well, I couldn't say how many now, but I saw him several times, yes, sir.
Q. Did you get down behind the boiler-head just about as quick as you could, the moment you saw these lights?
A. Well, the first thing I did, I ran across and started to jump off and I didn't want to do that, so I got behind the boiler head.
Q. You ran and started to jump the instant you saw the lights?
A. Yes, sir, when I hollered to Mr. Robertson.
Q. Why didn't you pump off?
A. Well, it was too dark out there.
Q. A little bit too fast, wasn't it?
A. Well, I knew pretty well about where I was at, I knew the conditions there—a high fill and a bank on the creek.
Q. So you thought the boiler-head would be the best protection?
A. Yes, sir.
293 Q. And Robertson got down there behind the boiler-head, too, didn't he?
A. Yes, sir, we were pretty close together.

Q. You say you got down behind the boiler head so that pieces of timber would not hit you?
A. That was my idea.
Q. Were they flying pretty thick about that time?
A. No, not when I got there.
Q. You got there ahead of the timbers?
A. Yes, sir.

Redirect examination.

By Mr. Hoke:

Q. I forgot to ask you about the whistle, did Robertson blow the whistle at all?
A. Yes, sir.
Q. Then tell us about what he did with the whistle?
A. Well, when I hollered at him, the first he did, he applied his brakes in emergency, and then he grabbed this whistle and went to blowing it.

GIRD ROBERTSON, recalled on behalf of the defendant, testified:

By Mr. Hoke:

Q. Did you know Mr. Peery before this accident?
A. I did.
Q. What was the extent of your acquaintance with him, how well did you know him?
A. Oh, I have known him for the last eight or nine years I guess, something like that.
294 Q. Saw him frequently?
A. I have lived right close to him, inside of a square for the last three or four years.
Q. In your own way tell the jury your recollection of whether Mr. Peery before this accident, was an erect man, or whether he was a stooped man, and just tell it in your own words and as fully as you can, because I think you can see what the controversy is here?
A. Well, from my standpoint of view, he was a mighty round-shouldered man, always bent that way ever since I knew him, and he carried his head inclined to be forward always.
Q. How did he walk, if you can describe it at all?
A. Well, he walked a little bit sluggish; he never was what I call a spry man. He never was what you might call a quick man on his feet.
Q. Anything noticeable about the way his feet treaded?
A. Well, I believe you would call him kind of a pigeon-toed fellow—toed his heels in somewhat; he was always heavy.
Q. You saw Mr. Peery there last summer, did you not, when he was running that little feed store there?
A. Yes, sir.
Q. You were on very friendly terms with him?
A. Yes, sir.
Q. You are now?
A. I am.

Q. Did you buy any feed from him?
295 A. Yes, sir.
Q. What did you buy?
A. Well, some few bales of hay, might have bought a sack of mixed feed from him a time or two.
Q. How big were those bales of hay?
A. Oh, they would run from 65 to 95 pounds, hardly ever over a hundred.
Q. Did he ever deliver a bale of hay to you, to your wagon?
A. Well, yes, he got the hay out to my wagon if I went after it, sometimes he would send it over to the house when I was away.
Q. Was there ever any occasion when you saw him handling a bale of hay there?
A. Yes; he had a hook that he generally handled the hay with and would bring it out to the buggy or wagon.
Q. How would he do that? Just describe it to the jury?
A. Sometimes he would handle it with the hook, or maybe he would catch it and handle it with his knees to the wagon.
Q. What were the dimensions of the bale of hay, how long was it and how thick?
A. Well, it is something like, I reckon, five feet long, four and one-half, something like that; the average about four I expect, about two-foot thick.
Q. Where did he keep it—in the store?
A. Yes, sir.
Q. And he brought it out of the store and put it on your buggy?
296 A. Yes, sir.
Q. Or spring wagon rather?
A. Yes, sir.
Q. Or ordinary wagon—which was it?
A. A spring wagon.
Q. Do you remember particularly about his handling any bags of feed or anything of that sort, or don't you remember about that?
A. I remember him handling mixed feed by the ears; they generally had on the end of the sack what they call ears—mixed feed, he would drag it sometimes to the spring wagon.
Q. You have seen Mr. Peery walking around up here at the trial this time?
A. Yes, sir.
Q. And had you seen him recently in Paducah?
A. Yes, I saw him some a week ago, or a little over or a couple of weeks.
Q. Now tell the jury as to your impressions, whether since he has been here in St. Paul he seems to be stiffer in his movements or just compare the way he gets around here with the way he gets around down home; that is what I am driving at.
A. Well, he gets around slow up here, but then for the last three or four months, since this new business he has been in, he is in the office down there, and he had nowhere to go than attend to the office, running the scales and handling the scales in the office and answer-

ing the telephones, he has not been running around, so out of down work at all.

197 Cross-examination.

By Mr. Anderson:

Q. We took your deposition before?
A. Yes, sir.
Q. And you were cross-examined at that time?
A. Yes, sir.
Q. Is that right?
A. That is right.
Q. And you were in the employ of the railroad company at that time, weren't you?
A. No, sir.
Q. You were not working for the road then?
A. No, sir.
Q. When did you stop working for the road after this accident?
A. In January, 1912, I think it was.
Q. And how long were you out of the employ of the road?
A. Something a little over a year, about a year.
Q. Were you discharged?
A. Yes, sir.
Q. For exceeding the speed limit—wasn't that true?
A. I was discharged on this accident, that is all.
Q. Oh, on this accident?
A. That is a letter I got.
Q. They kept you out of the service about thirteen months?
A. Something like that, yes, sir?

Q. Were you in the service of the company when the case
198 was tried a year ago in January?
A. No, I don't think so.

Q. Did the defendant or any of its agents (Mr. Payne) request you to come up here at the other trial a year ago?
A. No, sir.
Q. Didn't ask you to come?
A. No, sir.
Q. You were there in Paducah?
A. Yes, sir.

Redirect examination.

By Mr. Hoke:

Q. Did Mr. Anderson ask you to come up here at the last trial at all?
A. No, sir.
Q. And he took your deposition down there?
A. Yes, sir.
Q. And were other members of the crews involved in this accident there at the time your deposition was taken?
A. Yes, sir.
Q. And when were you reinstated?

A. Along the first of the year, I don't remember now, in February, I think it was. I won't be sure—February or first of March, something like that; I don't remember now, it was getting cold weather.

Q. Are you back on same run?

A. Well, I am running—well, practically what you might call the same, from Paducah to Jackson, Tennessee.

Q. Were your seniority rights restored?

A. Yes, sir.

Q. You were put right back just the same as you were before?

A. Yes, sir.

JERRY CLARK, sworn on behalf of the defendant, testified:

By Mr. Hoke:

Q. What is your name?

A. Jerry Clark.

Q. What is your work, Jerry?

A. Flagman for the I. C.

Q. Where?

A. At Tennessee street.

Q. At Tennessee street in Paducah?

A. Yes, sir, at the street crossing.

Q. And just tell the jury what your job is.

A. Flagging the crossing at Tennessee street—I have four gates, I have the west gate and the north gate.

Q. From what point do you operate those four gates?

A. Why, I have an air pump.

Q. And you are up in a little cab?

A. Yes, up in a cab about 10 or 15 feet high from the ground.

Q. And are there windows, on the sides of your cab?

A. All around on every side, yes, sir.

Q. How far is your cab from the place where Mr. Peery was running this feed business last summer?

A. Well, as nearly as I can guess at it, I guess about three hundred feet.

Q. About three hundred feet?

A. Yes, sir.

Q. Do you remember seeing Mr. Peery there?

A. Yes, sir, I seen him over on the porch of his store.

Q. Could you see from your place to the porch of his store?

A. Yes, sir; there wasn't anything in the way at all—just clear and open.

Q. Have you any recollection of seeing him do any work there last summer?

A. Well, I seen him carry some flour out in his hands and put it in a spring wagon; had two sacks in his hands, putting them in the spring wagon.

Q. How big were those sacks?

A. Why, they was, I suppose—they were small sacks.

Q. Did you ever see him handle any hay?

A. Yes, I seen him handle some hay there one day, on the platform there.

Q. Did you ever see him do any stooping to pick up bags, or anything of that sort?

A. Yes, he was using a cotton hook on the end of the bale of hay.

Q. Did you ever see him do any work about a coal car?

A. Why, I remember seeing him one day shoveling coal out of the coal car.

Q. Did you see him get into the car?

A. No, sir, I don't remember seeing him—when I saw
301 him, he was already in the car; I didn't see him get in the car at all, he was already in the car when I saw him.

Q. And where was he shoveling the coal to?

A. He was shoveling it out in a little wagon.

Q. Where was the wagon?

A. The wagon was standing on the upper side of the car next to his—well the side where his feed store was.

Q. How high were the sides of the gon?

A. Well, they were about 3 feet high, I guess.

Q. He was shoveling the coal?

A. Yes.

Q. Out of the car over the sides of the gon, into this wagon?

A. Yes, sir.

Q. Do you remember about how big a wagon that was?

A. No, sir, I think it was a little one-horse wagon, though.

Q. Did you notice him particularly in obedience to any request made?

A. Why, nothing more than the claim agent was up there in the cab with me and——

Q. And he asked you to notice and see what he was doing from time to time?

A. Yes, sir.

Q. Asked you to look over there once in awhile and see what work Mr. Peery was doing?

A. Yes, sir.

Q. That is how you happened to be noticing it?

A. Yes, sir.

302 Q. You didn't keep any memorandum did you?

A. No, sir—I can't read and write, you know.

Cross-examination.

By Mr. Anderson:

Q. You mean the claim agent, Mr. Payne here?

A. No, sir, the other one before Mr. Payne.

Mr. Payne: We had another man there for a little while.

Q. Mr. Payne has been there for years?

A. Yes, sir, but this man came by, and he was going south some-

Q. He told you to keep your eyes open or peeled and see what you could find out about Peery?
A. Yes, sir.

HENRY S. SEMON, sworn on behalf of defendant, testified:

By Mr. Hoke:

Q. Mr. Semon, where do you live?
A. I live in Paducah.
Q. How long have you lived there?
A. I have been there about 55 years.
Q. In general what has been your occupation?
A. The last work I done I have been working for the city, I drove patrol wagon there for four years, and also officer there, policeman, for about 12 years, I guess, close on to that.
Q. And now recently what is your work?
A. Just whatever I can catch; I have no trade of any kind.
Q. You do occasional——
303 A. Just anything I can get.
Q. Work of different sorts. Did you at the request of Captain Moore undertake to observe what Mr. Peery was doing some time last October?
A. Yes, sir.
Q. Now just tell us where you went and what you saw, and speak just as distinctly as you can?
A. Why, I don't remember the date exactly right now.
Q. Well, I don't know that the exact day is important, do you remember the month?
A. The month was November according to my best recollection.
Q. What is that?
A. In November, I think, was my present recollection.
Q. What is that?
A. In November, I think, was my present recollection.
Q. October?
A. October, or November, or something.
Q. Some time last fall?
A. Yes, some time in the fall, I don't remember the date exactly.
Q. Now, just tell us where you were and what you saw.
A. Why I was over in the yard there, right across from his place of business there, and walking around there about a hundred yards away, or a little over, and I seen the gentleman shoveling coal out of a wagon in a one-horse wagon at the side of the car, and
304 I also saw him climbing up over the bumper, what they call in kicking them together.
Q. Bumper of what?
A. Of a coal car, under the gon.
Q. Was that the same day you saw him do that?
A. Yes, the same day.
Q. In order to do that, what did he have to do?
A. Well, he had to reach up with both hands, take both hands to get himself up.

Q. Do you know whether or not he raised his right hand up to get hold of the handhold?
A. He used both hands, right and left.
Q. Climbing up over the end of the gon?
A. Yes, sir, right over the end.
Q. How high were the sides of the gon, about?
A. Well, the sides of the box was about four feet high.
Q. Did you at any later time see him do any work?
A. No, sir, not outside of that—outside of what I saw him shoveling coal.
Q. Did you see him shoveling coal at any other time?
A. No, sir, he was just finishing up one carload of coal that he had there, and that was the last thing he done, I think, I didn't see him do any more after that.
Q. Did you see him do any work around his feed shop there at all?
A. No, sir; he had nothing in there only a few sacks of flour. He came down during the day between times and stayed there
305 may be an hour or so and walked right back home.
Q. Where was the wagon with reference to the side of the car?
A. On the east side of the car.
Q. How close to the car?
A. Well, it was about, just as close as they could get them running up against the gearing of the trucks.
Q. Was Mr. Peery standing on top of the coal or standing down——
A. No, sir, right down on the floor. He had part of it already out.

Cross-examination.

By Mr. Anderson:

Q. You were watching Mr. Peery at the request of Captain Moore, I think you said?
A. Yes, sir.
Q. What were you paid for your services?
A. I didn't get anything.
Q. What?
A. I never got anything.
Q. Were you doing this for nothing?
A. Well, I don't know yet.
Q. You still have hopes?
A. I haven't got nothing yet.
Q. You haven't been paid yet?
A. No, sir.

Mr. Hoke: Oh, he will be paid.
Mr. Anderson: Yes, sure, of course.

Q. Counsel says you will be paid. Now have yo any
306 idea about the length of time your services for which you are getting a pay check?

A. Well, I got fourteen days.
Q. Fourteen days?
A. Yes, sir.
Q. And the result of your fourteen days' service is observing him shoveling some coal—is that it?
A. Yes, sir.
Q. And climbing up on the bumper——
A. That is all I saw.
Q. How close were you to the car when you saw these little episodes?
A. About 100 feet.
Q. Out in the open, or were you hiding yourself?
A. No, sir, I was in the open.
Q. Right in the open?
A. Yes, sir, everybody could have seen me both ways any way they wanted to.
Q. Did you know Mr. Peery personally?
A. I had never knowed him until a few days before I went to work for the company.
Q. You never knew him?
A. I never knew him until a few days before I went to work over there.
Q. Before you went to work for the Illinois Central?
A. Yes.
Q. Or Captain Moore, as the case may be?
A. Captain Moore.
Q. Had you ever seen Peery before?
A. No, sir, I never had.

307 Q. How many days was it after Captain Moore or the Illinois Central employed you, before you saw Peery at all?
A. Well, I saw him the day I went to work.

Q. Oh, the day you went to work?
A. Yes, the same morning.
Q. Where was he then?
A. He was walking around there in the yard.
Q. What yard?
A. In his own yard over where he had his place of business.
—. ——.
A. No, sir, at his place of business.
Q. How much of the time, how much of the fourteen days did you put in? Did you put in full hours?
A. Yes, sir.
Q. Ten hours a day?
A. No, sir, nine hours.
Q. So that you spent really something over one hundred hours watching Peery?
A. Well, I don't know.
Q. Nine hours a day for fourteen days?
A. Yes, sir.
Q. That is what you are going to ask pay for?
A. Yes, sir, I expect to.

Q. And the result of the one hundred hours' observation, or such a matter, amounts to this, that you saw Peery get up on a gondola car and you claim to have seen him shovel coal?
A. That is the only time.
Q. How long had he been at that car before he used a shovel?
A. Well, he just climbed up and went and picked up the
308 shovel and went to shoveling.
Q. How long did you stand there watching him?
A. About 20 or 30 minutes.
Q. 30 minutes, right in the same spot?
A. No, I was walking up and down.
Q. Walking up and down what?
A. The side of the track that I was on.
Q. In full view, were you?
A. In full view.
Q. Was there anybody else shoveling coal there?
A. Well, there was a little boy in there helping him.
Q. There were two persons shoveling coal that you saw?
A. Yes, sir.
Q. A little boy and a grown man?
A. Mr. Peery.

Mr. Anderson (to plaintiff's son): Will you stand up, Athol, so the gentleman can see you?
Boy stands up.

Q. Is that the boy?
A. I think he was the boy; I am not certain, it looks sort of like him.
Q. You didn't see another man there making three persons, did you?
A. No, sir, I did not; I don't remember it.
Q. At no time?
—. ——.
Q. What you saw was a man and a boy shoveling coal?
A. Yes, sir.
Q. And you say the man was Mr. Peery?
A. Peery was one, and this boy was the other.
309 Q. Which end of the car did Peery go up at?
A. He went up on the north end.
Q. Which end were you looking toward?
A. I was on the opposite side straight across on the east side from him.
Q. Oh, you were on the side?
A. Yes, sir.
Q. How did he get up—on the bumper?
A. Well, he pulled himself up, got up with his knees on top and then pulled himself up with his hands.
Q. On the bumper?
A. Yes, sir.
Q. You mean the coupling irons?
A. Yes, sir.

Q. What you call the bumper?
A. I call it the bumper, some others call it the coupling.
Q. Did you get familiar with gondola cars and the appliances on the cars, while you were down there in those fourteen days?
A. No, sir, I used to work there in the yard of this company.
Q. You knew all about how those cars were equipped with grab-irons and stirrups, didn't you?
A. Yes, sir.
Q. You know that every gondola car has a stirrup?
A. No, I am not well acquainted with all that, I worked in the shop there for about a year.
Q. While you worked in the shop you had a good deal to see about cars, didn't you?
310 A. Not much.
Q. Well, you have seen them lots of times, haven't you?
A. Yes.
Q. That is, if you were employed as a brakeman, I suppose you would have the faculty to keep your eyes open—is that all right?
A. Well, yes.
Q. Now, we will consider this table as a gondola car; take this corner of it where I am standing facing the Court, would be the left-hand front corner; there is a stirrup running right down here under every car, isn't there?
A. Yes, sir.
Q. Put there for men to step on to get onto a car?
A. Yes, sir.
Q. And right above that stirrup is a horizontal grabiron, on a gondola car, isn't there?
A. Two or three of them.
Q. They are right above the stirrup?
A. Yes, sir.
Q. And above that is a second one, is that right?
A. There is kind of a step.
Q. No, I am talking about the grabirons on the side of a gondola car.
A. Some call it a grabiron, I would call it a step.
Q. Well, call it a step, and there are two or three on gondola cars above the stirrup, are there not?
A. Yes, sir.
311 Q. Go right around the corner on the other end, you find another half-inch grabiron, don't you?
A. Over the draw bar? It is not over the draw bar.
Q. No, it is out here at the corner, isn't it?
A. No, one right over the draw bar sometimes; sometimes they are on the side.
Q. Did you ever see gondola car with a grabiron right over the draw bar?
A. Yes, sir, I have put them on there; they have them sometimes, for the brakemen to catch hold of to make the coupling—they used to in the old times when I was working there, they had those old-time couplers.

Q. Oh, yes, but I am talking about modern days; where is the grabiron now?

A. Well, it is over at the side, kind of over at the side, reaches from one side to the other in the middle, sometimes they put them on the whole thing.

Q. Did you ever see a grabiron on a gondola running clear across the end?

A. Yes, I have.

Q. I mean in the modern days?

A. I don't know as I have lately.

Q. You have never seen anything like that since they had automatic couplers?

A. I didn't notice them that has.

Q. The convenient way to get upon a gondola car is to step into the stirrup and take hold of the grabiron and walk up, isn't it?

A. On the side.

312 Q. And you saw him go around here to the end of the car, get his knees up on the bumper and haul himself up?

A. That is the way he got up.

Q. Do you happen to know what there was at the end of that car there on the ground? What was there on the ground?

A. There wasn't anything on the ground; the ground was just a little higher than the iron.

Q. Any timbers there or stopping-bumpers at the end of the track?

A. No.

Q. Sure of that. Did you observe close enough?

A. The car was away from that; if there was any there I never noticed it.

Redirect examination.

By Mr. Hoke:

Q. Have you ever seen other men get on the cars that way?

A. No, sir, not there, I didn't.

T. J. MOORE, sworn on behalf of defendant, testified:

By Mr. Hoke:

Q. Mr. Moore, where do you live?

A. Paducah, Kentucky.

Q. What is your business?

A. Detective.

Q. Did you have anything to do with observing Mr. Peery last fall?

A. Yes, sir.

313 Q. Did you employ Mr. Semon?

A. I did.

Q. Did you yourself see Mr. Peery at all?

A. Yes, sir.

Q. Just tell us what if anything you observed.

A. I only saw him on one occasion, passing by Seventeenth street

to Nineteenth street, he was in the car, the north end of a coal car, shoveling out coal into a spring wagon.

Q. Was he himself shoveling?

A. Yes, sir.

Q. Now, describe the movements that he was going through there, in doing that shoveling?

A. The car apparently was half or a little over half unloaded and he was down on the floor shoveling with a scoop throwing it out of the car.

Q. And in doing so he had to put his shovel over the edge?

A. Oh, yes, sir, yes, sir.

Q. Or could he just sort of jerk it up in the air?

A. No, sir, he put his shovel over the side, his wagon was right alongside of the car.

Q. Is that all that you saw?

A. No, on the second afternoon after that, I passed there, I think it was in the afternoon, if my recollection serves me—why he came up to his place of business or was there when I got there rather, and there was a chair sitting out there and he just picked it up and walked in; that is the only times I saw him about his business place.

Q. Just picking up a chair and walking in?

A. That is the only times I saw him.

314 Q. Have you seen him walking around here?

A. Yesterday, I have seen him walking around here.

Q. Is he any stiffer here?

A. You understand when I say that is the only times that I saw him, I mean that is the only times I saw him using physical means, you know, doing anything. I saw him several times, but that is the only times I saw him doing that.

Q. You were acquainted with him, were you?

A. Yes, sir, I am acquainted with Mr. Peery.

Q. Is he any stiffer here than he is in Paducah?

A. Yes, sir, straight.

Cross-examination.

By Mr. Anderson:

Q. How do you know he is?

A. Well, from his appearance.

Q. The question was if he was any stiffer—I just wondered if you knew.

A. Well, I only judge from observation, sir.

Q. You spoke so freely I didn't know but you knew. You don't know anything about whether he is stiffer or not?

A. Oh, no.

Q. How long were you in the employ of the Illinois Central as detective assigned to the special duty of watching Mr. Peery?

A. I had no specified time.

Q. Oh, are you regularly in their employ?

A. Do you mean when I began?

Q. Yes.

315 A. The 20th of October, sir.

Q. The 20th of October you were employed by the Illinois Central?

A. Mr. Payne employed me on I believe the 18th or 19th—the 19th, I think. And I put Mr. Semon to work on the 20th.

Q. Oh; what did you do?

A. I did likewise.

Q. What?

A. I did likewise, I observed his——

Q. How long have you been a detective?

A. About 15 years.

Q. A trained man in that business then?

A. Well, I don't like to say that, I would rather somebody else would say that.

Q. Well, you have had a great deal of experience?

A. Yes, sir.

Q. I didn't mean a competent man when I said trained.

—. Well——

Q. How long have you worked for the Illinois Central Railroad Company?

A. I don't work for them regularly; I don't work for either of the companies, but I do the M. C. & St. L. work when they have it and some for the I. C. when they have it, but my principal work is city work.

Q. Are you employed regularly by the city?

A. No, sir.

Q. Then how did you get in the employ of the city?

316 A. I mean of the city work, robberies, murders, and things of that kind—Mr. Collins, the ex-chief, and I run a detective agency of our own, known as the Collins-Moore Detective Agency. I mean that is the kind of work we do—robberies and things of that kind, stealing from railroad companies—we have two banks, we have the hotels, several, there are three dry goods houses and things of that kind that we furnish men and do work.

Q. Was Semon one of your regular men?

A. Yes, sir.

Q. Employed him right along?

A. No, sir, only when I have work for him.

Q. He is a good man in that business?

A. He is honorable and sober, and reliable.

Q. And competent?

A. Yes, sir.

Q. So he would be a man that you would expect to find out everything about Peery in fourteen days that a good competent man could find out?

A. I can explain the fourteen days if you would like to have me do it. Mr. Semon being an honest man reported to me that he had closed his business. I gave him 60 days' work for me.

Q. Oh, he was on duty 60 days?

A. No, sir, I gave him that. He came to me and says, "That man has closed his business." That was about the latter part of

November. He says "He isn't doing anything, you are just paying me for nothing." I says "Hang off."

Q. What do you mean by that?

A. I discharged him from the work of that case.

317 Q. You intended to keep him on 60 days?

A. If it was necessary, yes, sir.

Q. Well, what were you trying to do?

A. Observe actions, of Mr. Peery.

Q. Well then I suppose if he closed his business there wasn't anything further to do, was there?

A. No, sir.

Q. You didn't have the slightest occasion to watch and see how the gentleman moved about the streets of Paducah?

A. No, sir.

Q. Why was it any more valuable to the Illinois Central for you to render services with Mr. Semon in observing Mr. Peery in November than it was in December?

A. That was for Mr. Payne and not for me.

Q. Did you get discharged from the job too, as soon as the store was closed?

A. No, but I notified Mr. Payne of the condition of things; he told me then to lay off.

Q. Then did Payne tell you to stop?

A. Yes, sir.

Q. So you didn't work any longer there?

A. No, sir.

Q. Then, how much time did you put in?

A. Five days.

Q. And Semon about fourteen?

A. Yes, sir. I was not there every day, you know.

Q. But the five days were in the fourteen days' period?

A. Yes, sir; that is the idea.

318 Q. And how did you happen to be down by the flat car observing some coal being shoveled?

A. Tennessee street runs east and west and from Nineteenth to the river——

Q. Yes, I know it does.

A. —and then we have a turn there. and it is called the Mayfield road, but it is still Nineteenth street really, and going back and forth down Tennessee street.

Q. You happened to pass along?

A. Yes, sir, I made it my business to pass along—not happened, I made it my business to pass along.

Q. Why did you make it your business to pass along this coal car, if you didn't know Peery was there until you saw him?

A. How could I know till I got there?

Q. How did you happen to make it your business.

A. Because the company employed me to do that, and I made those trips to see if I could observe anything; if he had not been there I would not have seen anything.

Q. Why did you go by that gondola car?

A. The flat car was sitting on the east side of his building and almost in the street, as it were.

Q. It was right close to his building?

A. I was right up against it, yes, sir. The main line runs along this way—what we call the Tennessee line, and there is a spur track comes in from the south, comes in this way, and comes right along by Mr. Peery's store. This is Tennessee street, but this
319 track comes along on the east side. Well there is a track between him and the railroad.

Q. Now, were you going up there with Peery in your mind at the time?

A. Yes, sir.

Q. To see if you could catch him?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. When you were employed, Payne told you his ideas on the subject, and wanted you to watch out to find Peery doing some work, didn't he?

A. Yes, sir; that is if he did any work I was to observe that work. He didn't know whether he would or wouldn't work, I don't suppose; I don't know.

Q. Well, then the result, as I take it, of fourteen days by Semon and five days by you, is that you saw Peery pick up a chair and take it with him in the store——

A. Yes, sir.

Q. Did that strike you as quite remarkable?

A. No, sir, but that was the only thing I saw him do where there was any manual or physical effort, only walking around quite a number of times.

Q. Was Sefon there when you saw him shoveling coal? In the neighborhood?

A. Well, that I don't know.

Q. You don't know whether it was the same day that Semon is talking about or not?

320 A. No, I do not.

Q. Anybody else in the coal car shoveling coal?

A. Yes, sir, there was a boy.

Q. That is the little boy Athol?

A. I don't know his son; I was told it was his son.

Q. Well, you are a detective, aren't you?

A. Yes, sir.

Q. And one of the very first things a detective learns to do is see a face and remember it, isn't it?

A. That is right.

Q. Is that the boy?

A. I paid no attention to him whatever, not a particle, sir, I was not employed for that.

Q. Was there any other person in the car?

A. None that I saw, sir.

Q. Well, you would see them if they were?

A. Absolutely, yes, sir, I saw no one else in the car.

Recess until 2:00 P. M.

Mr. Hoke: I will now read the depositions of J. B. Acree, O. R. Kill and J. Q. Taylor, witnesses on behalf of the defendant, taken at Paducah, Kentucky.

Deposition of Dr. J. Q. Taylor, Taken at Paducah, Ky., October 28, 1912.

Direct examination.

By Mr. Hughes:

Q. State your name, age and residence.

A. J. Q. Taylor, age 50, Paducah, Kentucky.

Q. What is your occupation?

321 A. Physician and surgeon.

Q. How long have you been a practicing physician and surgeon?

A. 29 years.

Q. If you have, or have had any connection with the Railroad Hospital in Paducah, please state what it is?

A. I have been assistant surgeon of that hospital for the last 24 years.

Q. Do you know a man by the name of Robert H. Peary, who was a conductor?

A. Yes, sir.

Q. Did you ever treat him or examine him for any alleged injury?

A. Yes, sir, I think the 9th of December, 1911, he was brought to the hospital and was complaining about his injuries, and he would not let me examine him; I wanted to give him chloroform and he refused to take it; he said his collar bone was broken. I could not make it out and I wanted to give him the chloroform for that purpose to make the examination. I dressed the shoulder as if it had been a broken clavicle or collar bone rather. He had some bruises on his hips and one on his back is all the marks I found on him.

Q. Do you know how long he remained at the hospital?

A. On the 14th of December he left; he would not let the dressings stay on him and he took them off, and he took his clothes and went home without asking anybody.

322 Q. Did you or the other surgeons at the hospital know when he left?

A. Not until after he was gone.

Q. Did he ever return to the hospital for further treatment?

A. No, sir.

Q. Did you ever see him again?

A. On the 14th of March he came to my office in the City National Bank Building; he asked me to examine him, and I did so. He said that he wanted me to sign a certificate saying that he was totally disabled, that he wanted to get his insurance. I examined

him and tell him I could not give any such certificate. All I could find was in his right shoulder, there was some stiffness from now on, and I told him if he would go to work and use it, it would be all right.

Q. State what kind of an examination you made of him at that time.

A. I stripped him and examined him.

Q. Did you examine his back, shoulder and arm?

A. Yes, sir.

Q. Do you think, doctor, from the examination you made of this man that you can tell whether or not he does had any injuries that were permanent?

A. I don't think the injuries were permanent.

Q. At that time, state whether or not he had recovered from the injuries which you found upon your first examination of him in December, 1911, at the hospital, except as to the stiffness to which you have just referred.

222 A. Stiffness was not an internal injury.

Q. State whether or not there was any displacement of any vertebrae?

A. Not that I found.

Q. State whether or not the examination you made of him at that time would have developed any such displacement had it existed.

A. I think so; I stripped him and examined his back, shoulders and arm.

Q. Isn't it a fact that this last examination made by you of Mr. Perry was at his request, to see if you could find any injuries upon which you could predicate a certificate to be given to the Order of Railway Conductors that he had suffered a permanent injury?

A. Yes, sir.

Cross-examination.

By Mr. Anderson:

Q. Speaking of the Railway Order of Conductors, of course you know about such an order?

A. I have heard of it, yes, sir.

Q. Have you had anything to do with the Order, and particularly with reference to the rules of the damage or insurance?

A. I have had some, not a great deal.

Q. Is it not a fact that the Railway Order does not pay damages only for a loss of a limb?

A. Yes, sir; in most instances it is carried to the grand lodge, and they make exceptions, they have to lose a foot, eye or something that really disables them.

224 Q. Speaking now of your idea at the time Mr. Perry came to you in March, I think you said something to effect that he wanted you to sign a certificate as to total disability?

A. Yes, sir.

Q. Then, as a matter of fact, even though you signed such a certificate, under the rules he would not have received damages?

A. No, sir.

Q. Now, when you made the examination in December, that was very shortly after he had come in from the scene of the accident, was it not?

A. Yes, sir.

Q. Where was the discoloration?

A. The discoloration was about the right hip and on his back and shoulder.

Q. Speaking of discoloration on the back and shoulder, how far in towards the center of the back did that discoloration extend?

A. About middle way between the back and the joint of the shoulder.

Q. And you say at the time he was brought to the hospital, he said or intimated that his collar bone was broken?

A. Yes, sir.

Q. And you treated him as for a broken clavicle or collar bone?

A. I put the dressing on it and every night he would take it off; he removed the dressing himself; he said the dressing was too tight and he would remove it.

885 Q. When you made the examination in March, was there any complaint at that time from him as to his back?

A. Yes, sir.

Q. Did he walk in a stooped position?

A. He walked with the right shoulder drooped.

Q. Have about his position in walking otherwise, did he walk erect or lean forward?

A. He leaned forward in his walk.

Q. When you made an examination of his back in March, did you have in mind the possibility of anything being wrong with any vertebra or vertebrae?

A. No, sir, I examined for it, though.

Deposition of Dr. O. R. Kidd, Taken at Paducah, Ky., October 29, 1912.

Direct examination.

By Mr. Hughes:

Q. State your name, age, residence and occupation.

A. O. R. Kidd, age 39, Paducah, Kentucky; physician.

Q. How long have you been a practicing physician?

A. 14½ years.

Q. Do you know Mr. Robert H. Peery?

A. Yes, sir.

Q. When did you first meet him?

A. I think it was March 1st, 1912.

Q. Did he call to see you for medical attention or treatment?

890 A. No, sir, I was called to see his wife.

Q. If you at any time, at the request of Mr. Peery, made

any examination of him, please state when it was, and how you happened to make it.

A. On the 14th of March, Mr. Peery came to my office and wanted to see me, and said he received, while in the employ of the Railroad Company, caused by a rear end collision with another train, that he was bruised, fractured or some kind, and he was totally disabled; could not work, and wanted me to make an examination of him and sign a certificate of that kind, so that he could get his insurance in the Order of Railway Conductors. After I examined him, I told him I could not give him such a certificate, that I did not think he was totally disabled. I told him I thought with the proper treatment he would get all right, and referred him to an Osteopath for treatment, as I thought medicine would not do him much good.

Q. To what physician did you refer him?

A. Dr. Gilbert.

Q. Did you make an engagement with Dr. Gilbert to see him?

A. No, sir, I did not make an engagement; I called Dr. Gilbert and told him about Mr. Peery, that I thought he could do him some good, that he had some adhesions, and I was going to send him up to see him.

Q. Please state what kind of examination you made of Peery?

A. I examined his shoulder and his back; the places he was complaining of.

827 Q. Did you strip him?

A. I stripped him to the waist.

Q. Tell what you found from this examination?

A. I found a knot on the collar bone, or the first rib; it looked like it was probably an old fracture or bruise; and it would naturally show a knot for a while, and some stiffness in the shoulder joint, was the only trouble I could find. He complained of his back hurting him, but I could not find anything wrong with his back.

Q. From the examination you made of him, if there had been misplaced vertebrae, would this examination have disclosed such displacement?

A. I think so, yes, sir, I examined him very carefully.

Q. Have you ever seen Mr. Peery since?

A. I believe I have met him once or twice since, but have made no further examination.

Q. What are the biceps muscles, and where do they begin and to what point of the human anatomy do the reach?

A. The biceps is one of the muscles of the shoulder joint; I can't give the upper attachment exactly, but the lower attaches with the humerus, the long bone of the arm.

Q. Does it reach or connect in any way with the femur?

A. No, sir, the femur is a bone of the leg.

Cross-examination.

By Mr. Anderson:

Q. When Mr. Peery came to you in March, he com-
328 plained of pain in what part of his back, if your remember?
A. Principally between his shoulders, the lower part.
Q. The lower part between the shoulder space?
A. Yes, sir.
Q. Did he complain of any headaches?
A. Not that I remember.
Q. Why did you send him to Dr. Gilbert, for what purpose on the part of Gilbert?
A. None, only for the massage, as he had several adhesions.
Q. Where were the adhesions that you speak of?
A. I think about his shoulder, due, I thought to the inflammation he had when he got the hurt and the non-use of the muscles. In any case, if a person is laid up he will always have stiffness, and I sent him there for massage.
Q. Do you remember, Doctor, after you had examined him on the 14th of March, of his riding with you in your buggy home?
A. No, sir; I don't remember.
Q. Did you, at the time you made the examination or on that same day or a short time after the examination had been made, tell Mr. Peery that, in your opinion, it would be some years before he would be able to do much work?
A. At the time I made the examination, I told him he would probably feel that for some time, most especially if he caught cold or had rheumatism.
329 Q. Do you think that as far as your statement went?
A. Yes, sir?

Redirect examination.

Q. Do I understand that the stiffness you found from the examination of the shoulder, was from non-use; that is, by proper use of the shoulder, that stiffness would be relieved?
A. Yes, sir, I told him I thought the stiffness would be relieved by proper use of the muscles.
Q. Do I understand that it is your opinion, that while the stiffness was first caused by the injury, that it would have been relieved by proper use of the shoulder?
A. Yes, sir.

Deposition of Dr. J. B. Acree, Taken at Paducah on November 2nd, 1912.

Direct examination.

By Mr. Hughes:

Q. Please state your name, age, residence and occupation?
A. J. B. Acree, age 36, physician, Paducah, Kentucky.

Q. How long have you been a practicing physician, and from what college are you a graduate?

A. Since 1905, and graduated at Kentucky School of Medicine at Louisville, Kentucky.

Q. How long have you practiced in Paducah?

A. I came here in January, 1906.

330 Q. Do you know a man by the name of Robert H. Peery, who was formerly conductor on the Illinois Central Railroad, and if you know him, please state how long you have known him, and whether or not you ever treated him.

A. I have known him three or four years; and I treated him for a fracture of the clavicle.

Q. How long did you treat him?

A. From December 14, 1911, to January 11, 1912.

Q. If you made any examination of Mr. Peery for the purpose of ascertaining how he was injured, please state what kind of examination you made?

A. I stripped him to the waist, and examined him thoroughly.

Q. What injuries did you find?

A. I found a fracture of the clavicle, and he also complained of his back being hurt and of soreness and pain in his back about the seventh cervical vertebræ.

Q. If you examined his back for injuries, please state what you found, and what kind of examination you made.

A. I simply made an inspection and palpation, and felt along his back, and I did not find any injury; there was no discoloration and no visible injury to his back.

Q. State whether or not you examined his back thoroughly for the purpose of seeing if you could discover any injury there?

A. Yes, sir.

Q. And you say you found no injury?

331 A. No visible injury; by visible injury I mean there was no discoloration that would indicate an injury, nor could I discover any injury by pressing and feeling the back and spinal column.

Q. What was the nature of the fracture of the clavicle?

A. A simple fracture.

Q. Now, Doctor, from the examination you made of Peery, and the treatment that you gave him, do you think you are able to state whether or not he suffered a permanent injury, or to what extent he was injured; that is, how long, with proper care and attention, he should have been disabled by reason of the fracture?

A. Yes, I am able to state from my examination and treatment of Mr. Peery as to his injury.

Q. Please state whether or not, in your opinion, he was permanently injured, and if not, to what extent was he injured?

A. From the fracture of the clavicle he was not permanently injured. If he is permanently injured, it is somewhere else and I was not able to discover it during my treatment of him.

Q. On account of the injury which you discovered and treated

him for, to what extent or for what length of time, in your opinion, would he be disabled?

A. Under proper care and treatment it would have not been over two months, and this would be giving him plenty of time to recover, as the usual time for healing an ordinary fracture is three weeks.

332 Q. When did you last see Mr. Peery?

A. I have not treated him since January 19, 1912, but some time after that he was in my office and wanted me to examine him, and I understood that he was preparing some claim on account of his injuries; this was several weeks after the 19th of January, and I then made a thorough miscroscopical examination of him, and I found no evidence of any injury, except the injury for which I had treated him before, and he complained at the time of a stiffness of his shoulder and his back, though I was not able to find any enlargement or any evidence at all that would indicate any permanent injury to Mr. Peery.

Dr. HALDOR SNEVE, sworn on behalf of defendant, testified:

By Mr. Hoke:

Q. Dr. Sneve, you are a regularly licensed and practicing physician in this city?

A. Yes, sir.

Q. Have you a specialty?

A. Yes, sir, mental and nervous diseases.

Q. How long have you been engaged in your profession here?

A. In St. Paul?

Q. Yes.

A. Since 1897.

Qualifications of the witness admitted.

Q. Did you examine Mr. Peery at any time.

A. I examined him on October 17, 1912, I think it was,

333 and I examined him on the 16th day of February, of this month.

Q. Last?

A. Last.

Q. In other words, you examined him prior to the first trial, and then recently in preparation for the present trial?

A. Yes, sir.

Q. Now, will you please tell the jury of what your examination consisted and in a particular way just what you found?

A. Mr. Peery was stripped to the waist and I examined his skin, the muscles and bone and nervous system and heart carefully. I tested his reflexes, so-called—which give us information about the nervous system, and I examined the movements of the joints, with special reference to the right shoulder joint; I measured his arms and forearms; I felt of his muscles, to determine their volume; I had him squeeze a little machine called a dynamometer to test the strength of his hand and muscles of the forearm. I examined his

eyes witched the effect of light and shade upon them; I tested the movements of his head and I pressed all around the spinal column, and in examining the spinal column he complained of tenderness on pressure from about the third cervical or neck vertebra, down to about the 7th dorsal, just pressing over the spine or spinal column he said was painful in that area; he also complained of pain on pressure over the sacrum (that is the bones between the hip bones);

334 I moved his elbow and shoulder joint around on the right side, found that I could get his arm out to nearly a straight line, nearly an angle of 45 degrees. I found nothing the matter with the shoulder joint at all. I detected, I thought, a little callous over the clavicle.

Q. The collar bone?

A. The collar bone. It might indicate that he had had at some time a fracture there, but it had healed perfectly, and there was no shortening of the bone that I could see. He is round-shouldered, strong, well muscled, and is stouter now than he was in 1912 when I first examined him. His skin is perfectly healthy, heart healthy, lungs healthy and his muscles were well nourished; there was no shrinking up of the muscles anywhere, especially around the shoulder joint where he complained of disability. He said he could not get his arm up forward, high, he could just touch his head with his right hand put his right hand on his left shoulder. He said he could not bend his spine well. So far as I could see, he is a perfectly well man.

Q. Could you bend his head?

A. Yes, sir, I bent his head in all directions; with some difficulty. No complaint of pain and stiffness.

Q. Now, with respect to this shoulder, you say that you were able to get his arm up almost to a horizontal position?

A. Yes, sir.

Q. But that he could not get it up?

A. No, sir, he said it hurt, and he made resistance, his muscles tightened up.

335 Q. Muscles tightened up?

A. Yes, sir.

Q. What muscles tightened up in resisting that motion?

A. The muscles of the shoulder girdle so-called.

Q. I believe you stated that between your first examination in 1912 and the one you made recently, no atrophy had occurred of the muscles about the shoulder?

A. No, sir, there was no shrinking up of the muscles whatever, and not only that, but his right arm, the middle of the arm was approximately half an inch bigger than his left, and the right forearm about half an inch larger than the left arm.

Q. Now, if in fact he had not been using his arm, or if in fact there had been an inflammation in his joint restricting the motion of his shoulder what effect would that have had upon the muscles about the shoulder?

A. The muscles would shrink up; always shrink up if we don't use them.

Q. So far as you are able to observe, Doctor, is this man suffering from any injury to the shoulder at the present time?
A. No, sir.
Q. So far as you are able to observe, is he at the present time suffering from any injury to the backbones?
A. No, sir, decidedly not.
Q. Dr. Davis and Dr. Ball have stated that they have detected a sort of click in the shoulder joint, Dr. Davis detecting it when the arm is moved up and down toward a horizontal position,
336 Dr. Ball detecting it when the arm is moved forward and backward. What have you to say with respect to the clicking in the shoulder joint?
A. Everybody's shoulder joint can click if it is moved a particular way. This is a loose ball-and-socket joint.
Q. What is that click that you can get if you work your shoulder just right?
A. That click is due to the grating of the muscles and tendons.
Q. The grating of the muscles and tendons?
A. Yes.

Cross-examination.

By Mr. Anderson:

Q. Doctor, you are, I believe, surgeon and physician for the Great Western still, are you?
A. The Great Western Railway—I have not been since 1909.
Q. Oh, I didn't know you had severed your connection; you are not with any of the railroads now?
A. No, not any.
Q. Is there anything wrong with Mr. Peery's shoulder, from your point of view?
A. No, sir.
Q. Then why is it that it does not raise, not only completely at a horizontal line, but in the normal way, straight up in the air?
A. Well, it is hard for me to say.
Q. A normal shoulder works very freely, doesn't it?
337 A. Yes, very.
Q. I am getting to the age where I am not quite as limber as I used to be, but any man who has a shoulder, it is perfectly easy to put it right up that way and swing the arm right around?
A. Yes, sir.
Q. Can Mr. Peery do it?
A. I don't know whether he can.
Q. If he can't, is his shoulder right or wrong?
A. If he can't, his shoulder is wrong.
Q. I understand your position is that you think he can?
A. I think he can, yes.
Q. You think he could stand up here now and take that right arm and swing it out freely, as every strong man, don't you?
A. Oh, yes.

Q. Could you take his right arm now, and take it around that way? (Indicating.)
A. No, he is a stronger man than I am.
Q. And your idea is that you could not do it because he would not let you?
A. That is it.
Q. In other words, Doctor, your position, putting it flat and square, is that Robert Peery is malingering, or pretending?
A. Well, I don't like to use that word.
Q. Well, plain English?
A. That is the inference to be drawn from my testimony, yes, sir.

Q. And the only one you wish to have drawn, isn't it?
338 A. Yes, sir, that is it.

By Mr. Hoke:

Q. If Mr. Peery were put under an anæsthetic, could you doctors determine whether his joint locked?
A. Yes, sir, put him under an anæsthetic and I am sure that I can swing his joint just as easy on the right side as on the left.

Dr. ARCHIBALD MACLAREN, sworn on behalf of defendant, testified:

By Mr. Hoke:

Q. Dr. MacLaren, are you a regularly licensed and practicing physician and surgeon in this city?
A. Yes, sir.

Mr. Anderson: His qualifications are admitted.

Q. You have been a surgeon here for a good many years?
A. Yes, sir.
Q. At the request of the railroad company have you examined Mr. Peery with a view to ascertaining what his ailments are?
A. Yes, I examined him on two different occasions some time ago.
Q. In the fall of 1912?
A. I believe that was the time.

Mr. Hoke: I believe, Mr. Anderson, it may be understood that he did not participate in the recent examination because you objected to having more than two make the examination, isn't that
339 right?

Mr. Anderson: No, I didn't wish to be understood as saying that you couldn't have the same physicians you had before.
Mr. Hoke: I understood you to say you objected to our having more than two.
Mr. Anderson: Additional ones.
Mr. Hoke: It doesn't make any difference.
Mr. Anderson: I am perfectly willing that Dr. MacLaren can take Peery and examine him before he testifies, he is at liberty to examine my client.

Mr. Hoke: Not under an anæsthetic?

Mr. Anderson: No—nor any other client, as long as I live and practice law, will any of your doctors put any of my clients under an anæsthetic.

Q. When was your first examination of Mr. Peery?

A. I don't remember exactly—in the fall.

Q. The fall of 1912?

A. Of 1912.

Q. And your second examination was a little bit later?

A. About a month.

Q. Now, will you tell this jury what you observed at such examination?

A. Why, I didn't find that there was any diseased condition. The shoulder was apparently not as movable as it normally should be but not that I could find that there was any disease in the bones or in the joint tissue or muscles, that went to form the joint. There was no obstruction.

Q. Could you locate any condition in the shoulder which
340 could have been the result of any injury?

A. My recollection was that there was a slight thickening of the clavicle.

Q. That would be this collar bone?

A. The collar bone, as though the collar bone, *as though the collar bone* had been some time hurt.

Q. Well, would that have anything to do with raising the shoulder?

A. No, sir. That is only a brace, the collar bone is only a brace that keeps the shoulder back, prevents it falling forward.

Mr. Hoke: And then, of course, we are all agreed that that has completely healed and has nothing to do with the present ailment; that is right, isn't it?

Mr. Anderson: I agree that it has healed, that is as far as I go; I don't know anything about what effect a break of that bone would have on the shoulder, and the surrounding parts.

Q. Would the breaking of this collar bone have any effect on the movement of the arm at all?

A. Not that I know of.

Q. Have you ever known of any such case?

A. No, not in such a position; the thickening was in the middle portion of the bone where it was away from the joint; it would have nothing to do with the joint surface proper.

Q. Did you examine his back?

A. Yes, sir.

Q. Could you find anything wrong with his back?

A. No, excepting that his back was held forward as though
341 he were rather more pronouncedly round-shouldered than usual. But the back was normal and the X-ray pictures, of both the shoulder and the joint and the back were perfectly normal.

Q. That is, not diseased?

A. No disease.

Q. Showing no evidence of——

A. No evidence of old fracture or thickening of the tissues of the bones.

Q. In other words, could you find anything wrong with him at all, from such things as you could observe or feel?

A. No.

Cross-examination.

By Mr. Anderson:

Q. It is pretty hard for you to remember, I suppose, over a year and a half ago. Were you able, and did you in fact, raise Mr. Peery's right arm out from his body?

A. Almost about to a right angle.

Q. And of course it is true that any normal arm will go right up without any trouble?

A. Yes, sir.

Q. And to what extent were you able to take the arm in that way (indicating) and rotate it the way I am rotating mine, in a circle?

A. Only partially.

Q. Well, did you do it at all, Doctor?

A. Yes, I moved it back and forth.

342 Q. Were you able or did you try to bring the arm into a circle?

A. I could not do that.

Q. It is quite true, is it not, that it frequently occurs that shoulder joints are stiffened as to the freedom of motion and you physicians and surgeons are not able to discover the cause of this?

A. No, I hardly agree with that. I think you can always find a thickening of the tissues, especially when you take an X-ray picture of the joint.

Q. Will an X-ray picture show anything in the socket of the shoulder?

A. It will show any defect in the shoulder socket or bone.

Q. What you see in an X-ray picture is a shadow, isn't it, on the plate?

A. Yes.

Q. The humerus fits into the shoulder socket, doesn't it?

A. Yes.

Q. The shoulder socket is a very shallow socket?

A. Yes, sir.

Q. Now, if you take an X-ray picture against the shoulder, you get a shadow of the humerus and the surrounding bones, don't' you?

A. Yes.

Q. But you don't get any shadow in between the humerus and the shoulder socket, do you?

A. My recollection of this picture was that it was taken straight through, front and back.

343 Q. Those pictures you speak of are pictures that Dr. Ball at my request took, and which that gentleman turned over to you, and you were able to examine?

A. Yes, sir.

Q. If I remember correctly, there were two plates taken of the shoulder, weren't there?

A. Yes, sir.

Q. One from the front and one from the back. Now how will an X-ray shadow be cast that would give you any information as to the socket of the shoulder into which the humerus fits?

A. Well, when you take an X-ray picture, looking straight through in front, you get the outline of the shadow socket, and the bone lying against it.

Q. You get the outer edge of the socket?

A. Yes, you get the head of the bone and the socket in which the head of the bone lies.

Q. But you don't get the interior of the socket?

A. Well, you see it through.

Q. You mean you see what you call the white line through the dark shadow?

A. Yes.

Q. If it is taken just on the right line? Now, Doctor, you have been asked as to whether you discovered anything wrong with the plaintiff's back, and I think your answer in substance was, "no, except a marked stooping position?"

A. Yes.

Q. In fact, it is quite a marked stoop that he has, isn't it?

A. Yes.

Q. And particularly shows when he is stripped; that is, when you can see it a good deal better than when a man is dressed,
344 isn't that true?

A. Yes.

Q. And do you remember as to whether or not the muscles in and about the back, running from the neck down and along the side were rigid?

A. Yes, I think they were held rigid when you tried to move it.

Q. By that you mean a voluntary act on the part of the plaintiff?

A. Probably.

Q. When you say "held?"

A. Probably, yes.

Q. Did he appear to you to be frank and free to let you make your examinations or not?

A. Excepting as to the movement of his back and his shoulder.

Q. And you concluded that the rigid condition was voluntary, rather than due to any previous injury?

A. It seemed so.

Q. And the same, I take it, to be true, as to your position with reference to the movement of the arm?

A. Yes, sir.

Q. Now, when an ordinary man, of ordinary muscular development, holds his arm out say a little below the right angle, from his body, where you say you succeeded in getting Mr. Peery's arm, what is to prevent you, as a reasonably strong man—which I take

you to be—forcing that arm up in spite of the man's resistance, what is to prevent it?

345 A. His own weight.

Q. His own weight?

A. His own weight.

Q. Have you in your life, ever seen a man that could take his arm that way and resist a pressure of a hundred pounds upwards on it?

A. Yes, sir.

Q. How much can the ordinary man hold in his hand, at arms-length—a well developed, powerful man?

A. Now you turn your arm over, that is not quite the same thing.

Q. Well, I am asking the question, I don't say it was the same thing. How much can an ordinarily well developed, muscular, every day man, hold at arms-length, or raise out at arms-length?

A. Oh, I don't know, I suppose about 75 pounds.

Q. 75—did you ever try it, Doctor?

A. Yes, I have.

Q. You never did it?

A. Well, I don't know about that.

Q. 75 pounds—well, I was under the impression that it took a very, very strong arm to raise 50 pounds at arms-length. Have you ever tried or seen any man take an ordinary, old fashioned bucket, and raise it from the floor out at arms-length—have you ever seen that done?

A. No, I have seen men working with dumb-bells.

Q. Yes, I know, but haven't you seen that done—pick

346 up buckets and consider it a feat, among the young men, that they could do it?

A. I don't remember.

Q. In which way is the man the stronger, if you had an instrument so you could do that, in holding his arm out at right angles or nearly so, and pressing downward, or at right angles and raising—

A. The other position.

Q. When I raise, I am using the biceps, am I not?

A. The biceps and your shoulder joint.

Q. The biceps and muscles of the forearm, am I not?

A. Yes, sir.

Q. What muscles did I use when I pressed down?

A. The muscles of the back, and the muscles of the chest.

Q. Did you ever, in your life, see a man, outside of a circus, that could put his two hands nearly at right angles on two supports, and hold himself there?

A. Yes, sir,—the man that is an athlete can do it.

Q. I will leave the athletes out, let us talk of every day chaps——

A. I don't know about that.

Q. —is it your opinion that any man in this room could possibly do it?

A. I couldn't say.

Q. And certainly it is true, is it not, that if I could not support my

own weight, 170 pounds, on my two arms, that way, you as a doctor, could have that arm up?

A. Oh, I didn't try as hard as that.

347 Q. You didn't try as hard as that.

A. No.

Q. How hard did you try?

A. Oh, I suppose I must have raised thirty or forty pounds. It hurt him, he complained of it.

Q. Did you believe it hurt him?

A. He said it did.

Q. Well, did you believe it?

A. I couldn't say about that.

Q. If you did believe it, why didn't you go on?

A. He objected.

Q. In what way did he object, if you remember?

A. Oh, he said that it hurt him.

Q. Isn't it a fact that was noticed by you that Peary, during the examination was a very quiet and patient man and let you do practically what you pleased?

A. Excepting in the movement of his arm.

Q. Well, when you moved his head, I don't mean the rotating of it up this way—he let you do that freely, didn't he?

A. Yes, sir.

Q. But when you tried to bring his head back, or bring it down that way, or turn the whole head, how did you get along when you did that?

A. Why, it seemed to me that he held his head stiff.

Q. It was quite stiff, wasn't it?

A. Fairly so.

349 Q. Then also, you concluded that it was a voluntary act on the part of Mr. Peary?

A. I thought so.

Q. Now, Doctor, the shoulders are markedly sloped. Let us assume that prior to the 9th day of December, 1911—that is the date of this accident—that Mr. Peary stood erect, and did not have this stoop in his shoulders or back, and that the stoop, as you see it, has been there and remained ever since the accident, the accident consisting of a locomotive engine running into the caboose of Mr. Peary's train and smashing it practically into kindling wood; the testimony shows they scattered a mile eight car couples along, as the train kept running with the smashed caboose, Peary was in the caboose seated on a seat, when he found himself he was out on the west side, lying upon some fragments of the caboose; he says that when the blow came it fell as though some terrific blow came to his back, in the back of his neck, and on his right shoulder, the testimony further shows that the sternum, the upper part of the sternum, was fractured, and a bent in; one doctor testifying he examined him the next day after the accident and found the sternum broken—this part of it, the upper part, now I want to ask you if you can give any explanation of Mr. Peary's stooped position as you see it and as the testimony shows it has existed ever since the accident, if it did not

Dr. LOUIS DAUGHERTY, sworn on behalf of defendant, testified:

By Mr. Hoke:

Q. Dr. Daugherty, are you a regularly licensed and practicing physician and surgeon in this city?
A. Yes, sir.

Mr. Anderson: Qualifications admitted.

Q. And did you examine Mr. Peery?
A. Yes, sir.
Q. How often have you examined him?
A. Three times I think. I examined him twice in the fall of 1912 and then last Monday.

Q. Have you also seen the X-ray pictures?
351 A. Yes, sir.
Q. Now, just tell the jury what you have found.
A. You want the last examination?
Q. Yes.
A. I examined Mr. Peery last Monday in Dr. Sneve's office and found—his principal complaint was his shoulder; he claimed that he could not raise his shoulder above a certain point, slightly below a right angle. He complained of pain on pressure on the spine; he complained of pain running down into his hip and he complained of pain on moving his head; he said there was a clicking sensation, that when he had this clicking sensation he had a pain; and on examination I found some thickening of the inner end of the right clavicle I believe, some thickening just to the right of the sternum, indicating that there had been an injury in both of these places at one time. He was a round-shouldered man. I think that is all I recall. Oh yes, there was one other thing: We measured Mr. Peery's arms, looking for atrophy of the muscles, but found none.
Q. Found no atrophy of the muscles of the right shoulder?
A. No.
Q. And what would that indicate, Doctor?
A. Well, that would indicate that the muscles had been used. It is impossible to have muscles lie dormant and still not use them, without an atrophy.

352 Q. What particular muscles are used, for instance, in elevating the arm as he claims that he can't elevate it?

A. In raising the arm this way, there really are only two muscles that raise the arm out from the shoulder, those two muscles are the big muscle that covers the top on the outside of the shoulder called the deltoid, and then there is one farther back that runs along the top of the scapula, called the supraspinous muscle—those were the muscles that I looked at for atrophy in, and was unable to find it.
Q. You couldn't find that they had any appearance of non-use?
A. No.
Q. Well, could you find anything wrong with the shoulder?
A. No, sir.
Q. Either by feeling or by looking at these pictures?
A. No, sir.

Q. Did you find anything wrong with his back? And by wrong, I mean any condition apparently the result of injury?

A. No, sir.

Q. Is it possible, Doctor, to administer an anæsthetic just momentarily?

A. Why, yes, I think so, depending on how long you mean by momentary.

Q. Yes, a mild or a strong anæsthetic?

A. Yes, you get what we call complete anæsthesia, or partial.

353 Q. Is there much danger in that?

A. No.

Q. And the effect of administering an anæsthetic, of course, is to suspend the will of the patient?

A. Yes, sir.

Q. So that the patient can no longer voluntarily resist movement of parts of the body?

A. Yes, sir.

Q. And would that in this instance be a way of determining absolutely beyond any controversy between you doctors the question whether this man's shoulder locks?

A. Yes, sir.

Cross-examination.

By Mr. Anderson:

Q. Aren't you assuming a good deal, Doctor, that you would bring about a situation where you doctors would not disagree?

A. No, I don't think so; we agree some times.

Q. Well, I am glad to hear it. Doctor, let us start out right, if we can, is this man slightly stooped or is he markedly stooped?

A. I said he was round-shouldered, I didn't say he was stooped.

Q. Well, slightly round-shouldered or markedly so?

A. Oh, he is about what we call an average round-shouldered man; I have seen lots of men just about as round-shouldered as he is.

Q. You said average once. Isn't he any more round-

354 shouldered than the average men around here?

A. I don't happen to see anybody here quite as round-shouldered as he is.

Q. No, I guess not. If that back was straight before he was hurt, on the 8th day of December, 1911, and he has been crooked that way ever since, then would you say that that accident caused the bend in his back?

A. No, sir.

Q. It came anyway, did it?

A. He is holding it over, just like I am now.

Q. He is holding it over, and has held it over ever since?

A. That is my opinion.

Defendant rests.

ROBERT H. PEERY, recalled in his own behalf in rebuttal, testified:

By Mr. Anderson:

Q. Mr. Peery, you heard the testimony of Capt. Moore, did you?
A. Yes, sir.
Q. And of Mr. Semon?
A. Yes, sir.
Q. Did you shovel any coal in 1913?
A. No, sir, I did not.
Q. How many times, if at all, have you handled a shovel since you were hurt?
A. I never handled a scoop-shovel at all.

355 Q. Did you have any dealings with a couple of car loads of coal last year along some time?
A. Yes, sir.
Q. While you were running the feed store?
A. Right after I had quit the feed store or about the time I did quit.
Q. With two carloads of coal ordered in carload lots——
A. Yes, sir.
Q. —where a number of people combined to take a carload?
A. Yes, sir.
Q. Where were those cars placed when they came into Paducah, to be unloaded?
A. They were placed on the spur track belonging to the property that I was in possession of.
Q. How was the coal disposed of?
A. Well, we loaded up into the wagon and then it was handled to the different parties and unloaded.
Q. Whose wagon and horse was used?
A. They were using my wagon and horse.
Q. Who did the work?
A. A man by the name of Gardner and my boy did the loading and unloading.
Q. Were there two cars of coal brought up together and put there together?
A. No, sir, at different times. I don't remember the space between, but possibly a day or so between.
Q. And were you out and around the coal car that was first there and unloaded?
A. Yes, sir.

356 Q. And were you around the coal car that was unloaded second?
A. Yes, sir.
Q. You told us it was about the time or after the time you closed your store?
A. Yes, sir.

Mr. Hoke: I can tell you the dates—October 21st and October 28th.
Mr. Anderson: October 21 is Semon?
Mr. Hoke: Yes.

Mr. Anderson: October 28 is Capt. Moore?
Mr. Hoke: Yes, I think that is right. I know October 21 is Semon.

Q. Were you running your store October 21?
A. No, sir.
Q. Mr. Peery, I want you to tell the Court and jury exactly what you did in connection with those coal cars, and both of them, including all shoveling that you did and getting up on the cars and how you got up—tell everything about it.
A. I didn't do any shoveling at all. I got up on the car and did the weighing of the coal and telling the boys where that coal went to, the number of the street, and so on, and I climbed up on the coal car, climbed up on the end, climbed up on the draw-bar, and then stepped on the grabiron that was between the draw-bar and the corner of the car, and then around the corner of the car on to the ladder, and then into the car up on to the coal.
Q. How did you get from the ground to the draw-bar?
357 A. Well, stepped up on what we term the bumping block, to keep the car from going over the end of the rail, down on to the ground, and then steep up on the draw-bar.
Q. Was the car then unloaded in part?
A. Why, the first time that I remember of going up on the car—in fact the only time that I remember of ever going up on the car at all—was when they were unloading the first load out of the car into the wagon.
Q. What were you there for, what were you doing on the car?
A. One of the gentlemen that the coal was going to telephoned me to inspect the coal, and see if I thought that this coal was as good as number two coal.
Q. Which car of coal was this, do you remember, the first or second car that was unloaded that you got up on top of?
A. Why, it was the second car.
Q. And how did you get down off from that car at that time?
A. I walked to the far end of the car over the coal and got down on a fence, or rather a plank wall—the plank I suppose is about two inches thick and possibly a foot wide—that had been put up there to keep the coal when it was pitched over in the yard, from rolling back on the track under the car. I went to the other end of the car and went down on that plank and down to the ground.
Q. Were you ever on the other car that you had?
358 A. I don't think I was.
Q. You saw Mr. Semon here?
A. Yes, sir.
Q. When and where did you see him and notice him down there in Paducah?
A. I saw him there around my place of business.
Q. Did you see him at any time when you were out by the coal cars or the car, either one?
A. I saw him when I were at the scales, just a very short distance from the coal car, weighing a load of coal.

Q. Did you see Capt. Moore around there?
A. No, sir, I did not.
Q. You don't remember picking that chair up and carrying it off the porch?
A. No, sir, I have no recollection.
Q. Are you able to pick up a chair and walk off with it?
A. Well, I think an ordinary chair, that I would be perfectly able to take it any place that is in reasonable distance.
Q. Mr. Peery, I believe the doctors examined you here—Dr. Sneve, and Dr. Daugherty—in Dr. Sneve's office, three or four days ago?
A. Yes, sir.
Q. They stripped you there, didn't they?
A. Stripped me to the waist.
Q. I want to ask you this question, Mr. Peery: When they were handling and manipulating your arm and your shoulder out from your body, raising it, I want you to tell the Court and jury
359 as to whether or not you voluntarily made any resistance, and if so, when, and under what circumstances?
A. Why, to be sure I had to make some resistance when they hurt me so bad that I couldn't stand it.
Q. Did you make resistance otherwise?
A. No, sir, nothing except when they hurt me. I had to call them down on hurting me, they hurt me so bad that I couldn't stand it. When a man hurts me so bad as to make me holler he done hurts me.
Q. It is Dr. Daugherty's opinion, as I understand his testimony, that you are voluntarily carrying yourself in that position—are you?
A. No, sir.

ATHOL PEERY, recalled, on behalf of plaintiff in rebuttal, testified:

By Mr. Anderson:

Q. Do you remember about those two coal cars?
A. Yes, sir.
Q. Who drove the horse?
A. I did.
Q. Who did the shoveling and unloading the car? And shoveling it into your wagon?
A. A fellow by the name of Gardner.
Q. How long, if at all, did your father shovel coal into the wagon?
A. He didn't shovel it in at all.
Q. State when, if at all, you have seen your father do work
360 shoveling of coal in the last year—1913?
A. I have not seen him shoveling any.

Cross-examination.

By Mr. Hoke:

Q. What kind of a looking fellow was Gardner, is he a young or old man, or a boy?
A. Well, he said he was 54 years old. I don't call that very young.
Q. Was he a tall, slender man, or a short, stout man?
A. Well, he was tolerably tall. He was not so slender.
Q. Quite tall, but not very slender?
A. No, sir.
Q. Was he a man that looked something like Mr. Anderson, about that height?
A. Well, yes sir, he was about as tall as Mr. Anderson.
Q. Gray hair?
A. No, sir.
Q. Where does he live there?
A. Well, I don't know where he lives.
Q. What is his first name?
A. Al.
Q. You don't know where he lives there?
A. No, sir; Don't know whether he is there or not.

361 Redirect examination.

By Mr. Anderson:

Q. Was he a white man?
A. He was a half Indian.
Q. By the way, do you remember about how many days you and this Gardner, or whatever his name was, worked at unloading these two cars, can you give us any idea?
A. I believe it was about four days, all together.
Q. Did you shovel coal, too?
A. I shoveled a little out of the wagon.
Q. Did you shovel any from the car into the wagon?
A. No, sir.
Q. Pick up chunks and throw them in once in a while and help?
A. Yes, sir.
Q. Did you see Capt. Moore while you gentlemen were doing this work?
A. No, sir, I didn't see him then.
Q. Did you see Mr. Semon?
A. No, sir, I don't believe I did.

The plaintiff here rested in rebuttal and this closed the testimony.

Mr. Hoke: The defendant moves the Court to instruct the jury to return a verdict in favor of the defendant, upon the ground that the evidence fails to show that the plaintiff was at the time of the happening of the accident in question engaged or employed in in-

terstate commerce within the meaning of the so-called Fed-
362 eral Employers' Liability Act, upon which act this action is founded.

Mr. Anderson: The plaintiff objects to the allowance of the motion.

The motion was denied and defendant duly excepted to the ruling.

The case was then summed up on behalf of defendant by Mr. Hoke, whereupon court adjourned until Monday morning, February 2, 1914. Court convened on Monday morning, February 23, and Mr. Anderson summed up on behalf of the plaintiff. A recess was then taken until 2:00 p. m., at which time the Court instructed the jury as follows:

Charge.

Gentlemen of the jury, the plaintiff, Robert H. Peery, brings this action against the defendant, the Illinois Central Railroad Company, and for his cause of action alleges substantially in his complaint as follows: That the defendant railroad company is now and at the times mentioned in the complaint was a corporation under the laws of the state of Illinois, owning and maintaining lines of railway in and through the states of Illinois, Kentucky, Tennessee, and other states and operating the same as a common carrier for hire and was during all this time, engaged in interstate commerce. That one of this defendant's trains of railway extended through the state of Tennessee into and through the state of Kentucky, into the state of Illi-
nois, and has thereon certain stations in Kentucky known
363 as Fulton and Paducah, and that between these last named stations, other stations known as Krebs and Boaz; that at the time of the accident the defendant was operating its trains, and engaged in interstate commerce over said line last mentioned and between said stations and that the said trains of the defendant described were interstate commerce trains and that the plaintiff at the time of the accident was engaged as defendant's servant in one of these said interstate commerce trains. He then alleges that on the 8th of December, 1911, the plaintiff being in the employ of the defendant for hire as a freight conductor, and engaged in the performance of his duties upon and about one of the defendant's locomotive engines and trains then and there being run and operated by the defendant, along and over its interstate line of railroad and from Fulton to Paducah, in the state of Kentucky, and that on said day, about the hour of half past nine o'clock at night, the plaintiff as such conductor was upon one of the defendant's locomotive engines —I imagine that the original complaint, which I have not before me now, must have also had the word caboose or train in it.

Mr. Hoke: Yes, I think so, your Honor.

The Court: There is no evidence here that he rode on an engine, which was then and there being run by the defendant in a northerly direction along said line and at a point between said stations of Krebs and Boaz and while said locomotive engine and train, with

the plaintiff thereon, in the performance of his duties, was
364 being thus run and operated, the defendant and certain of its servants and agents, in charge thereof, carelessly ran another of defendant's locomotive engines along and over said track, and in a northerly direction and up to and against the locomotive engine and train upon which the plaintiff was riding and carelessly caused the said two trains to collide with great force and violence and carelessly caused the same to be broken and crushed and carelessly caused said plaintiff to be caught in said collision and wreckage and then and there very severely in*ujr*ed; that said collision and injuries were caused through the carelessness of the defendant and its servants and agents in charge of said other engine, and that under and pursuant—I need not read this, the common law of Kentucky, is out of it—the defendant was liable and responsible for the negligent acts, etc. That the plaintiff at no time knew, and that he had no means of knowing, that said other engine was approaching the train upon which the plaintiff was riding or likely to collide with the same. He alleges further that at the time of the accident he was 38 years of age, an experienced and capable railroad man; that he had been engaged in railroading for many years and that he was earning as such conductor and was capable of earning wages averaging at least $120 per month. That previous to said accident he had always been in good health; that by said accident he was severely and permanently injured upon and about his chest and back, and one of his shoulders; that his collar bone was broken; that he received a very severe nervous shock;
365 that he has been totally disabled and incapacitated ever since said accident and has continuously suffered pain and anguish both of mind and body and that the injuries thus received, as the plaintiff is informed and verily believes, are permanent and that he will, during the rest of his life, to a very large degree, be disabled and incapacitated and that he is informed and verily believes he will never be able to again engage in any lucrative occupation save and except in a slight degree and as he is informed and verily believes he will suffer great pain and anguish both of body and mind. He then alleges that by reason of these facts, he has been damaged by the defendant in the sum of $25,000 and he demands judgment in that sum.

Now the defendant, for its answer to this complaint makes the following statement: It admits that it has been and is a corporation as alleged in the complaint and owned and operated a line of railway into and through the states mentioned in the complaint; which railroad is used both for handling intrastate and interstate commerce. It admits that on the 8th day of December, 1911, the plaintiff was in the employ of the defendant company for hire as a freight conductor and that on said day, while the plaintiff was upon one of the defendant's trains, at a point between the stations of Krebs and Boaz, the plaintiff was injured by a collision between the train he was on and another train then being operated by the

defendant. It denies that said collision and injury were
366 caused by the carelessness or negligence of the defendant or of its servants and agents other than the plaintiff, and alleges that said accident was caused or contributed to by the negligence of the plaintiff. As to the age of the plaintiff, and as to the extent of his injuries, the defendant denies any knowledge or information sufficient to form a belief—which puts the plaintiff, of course, upon his proof as to all those things—and except as herein admitted, the defendant denies each and every allegation, matter or thing contained in the complaint, and the defendant asks that the plaintiff take nothing by this action and for its costs and disbursements.

To this answer the plaintiff, for his reply, denies each and every allegation in said answer contained save and except such parts or portions thereof as constitute admissions of allegations contained in the complaint. That puts at issue the allegation in the answer that the negligence of the plaintiff himself either caused or contributed to the injury and puts at issue all other matters that are not expressly admitted in the reply.

Now the answer in this case, gentlemen, admits the incorporation and general business of the defendant railroad company, and while it puts at issue the question whether the defendant was engaged at the time of the accident in carrying on what familiarly is called interstate commerce, this question as to its character has already been
to the supreme court of this state upon an appeal heretofore
367 taken upon certain questions raised here at a former trial and the supreme court has held, upon questions substantially as I understand the facts are here today, that this defendant railroad company was in fact engaged in what is known as interstate commerce and that this plaintiff was, as its servant, engaged also in interstate commerce and as I recall, counsel for the defendant in his address to the jury has said that there is substantially no difference between the facts in this case as they appear here upon this trial and the facts as they were passed upon by the supreme court of this state, and therefore it becomes my duty to say to you that so far as the law of this case is concerned, you will judge the plaintiff's case, and the defendant's also, by the act of congress regulating what is known as interstate commerce, and the plaintiff—each party—is entitled to the rights and to the benefits conferred by that act.

Now while the answer admits that the accident happened and that plaintiff suffered certain injuries thereby, the nature and extent of which injuries it puts the plaintiff to his proof, it denies that this accident was caused by the negligence of itself, or by that of any agent or servant of the defendant and alleges that plaintiff's own negligence caused this accident, and the principal question for you gentlemen, upon the evidence in this case, is to decide whose negligence caused the collision of these trains.

The mere happening of this collision and the injury to the plaintiff is not sufficient to charge the defendant company therefor.
To so hold would make the defendant company an insurer
368 of the safety of its servants while in its employ. It is not such an insurer, and the law does not make it so, but the

law imposes upon the defendant company the duty of using reasonable or, as it is also called, ordinary care, that its servants while engaging in its service, shall not be injured, and the Employers' Liability Act of Congress makes railroad companies like this, engaged as common carriers for hire, responsible in damages to any of its servants while so employed in interstate commerce carried on by such railroad company, who are injured because of the negligence of any of the railroad company's, other agents or other servants.

As I have said, the defendant railroad company was obliged to use ordinary or reasonable care to guard its servants while in their employ, from injury, and is responsible for the negligence of any of its other servants, causing such injury.

Now what is negligence in a case like this is best expressed by explaining to you what is meant by the words "ordinary care" or "reasonable care." Ordinary care or reasonable care is that care which a person of ordinary prudence and foresight would use under the same or under similar circumstances, and failure to use and observe such reasonable prudence or foresight is negligence.

The jury are sole judges of the facts in the case. You are the sole judges of what each person whose testimony you have heard from the witness stand or which may have been read to you from depositions or from the record has testified, or what credit you will give to the testimony of each witness and of what reasonable in-
369 ferences and deductions you will draw from the proven facts and circumstances of the case. And while speaking on this question, wherever the trial judge refers to the facts in the case, you are to consider it as always subject to your prerogative as sole judges of the facts.

On this trial it appears uncontradicted that this accident occurred under substantially these circumstances: On the day in question the defendant company was operating trains of cars at Fulton towards Paducah, Kentucky, one following the other, and designated, I believe, as first 180, and second 180. The plaintiff had charge of first 180 and subject to orders received from the defendant's train dispatcher at Fulton and the general rules of the defendant company, as to the management of trains; he had general control of the movements of this train or of his section. The second section of the train (or second 180) was in charge of James W. Gorman as a conductor, and the locomotive drawing it was in the control of D. H. Robertson as engineer; both servants of the defendant company, and for the movements of this second section and the manner in which it was handled on this occasion, the defendant company is responsible. As to the details of how and of what cars or locomotives these two sections of this train 180 were composed—when each left and when each arrived at given points—the last stop and all the facts with reference to the running from point to point—the story of this unfortunate accident—I will not refer to except to say that all such mat-
370 ters, so far as they shed light on the principal question here, are to be determined by you, gentlemen of the jury.

An important question for your determination arises over the train

orders given by the defendant's train dispatcher at Fulton to the persons in charge of both these trains, first 180 and second 180. That order is before you, and is in writing, reading it from the record it appears as follows: "Engines 876 and 367 coupled and engine 1603 will run as first and second number 180 Fulton to Paducah yards; first number 180, engines 876 and 367 coupled, will not exceed a speed of 15 miles an hour, from Fulton to Paducah yards." The train order is addressed to first and second 180.

Upon all the evidence the plaintiff claims that the defendant's servants in charge of second 180 were negligent, and that their negligence was the proximate—that is the ordinary and to be expected cause—of this accident in the manner in which they operated this train referred to as as second 180 and which collided with or ran into the caboose or rear car of first 180 in which plaintiff was riding at the time of the accident, and they refer to this running order by which the speed of first 180 is limited to 15 miles per hour. On the other hand, the defendants claim that under the evidence and under the terms of this running order, which it claims did not limit the speed of second 180 at all, that the plaintiff himself was negligent in the manner in which he operated or permitted to be operated the train first 180 upon which he rode, and that this negligence
371 was the proximate cause of this accident.

It is for you, gentlemen, to say, in the exercise of your prerogative, as judges of the evidence, which of these two contentions, that of the plaintiff or that of the defendant company is true; and I charge you that if after carefully considering all the evidence you find therefrom that the collision between the trains on December 8th, 1911, was caused by the negligence of the defendant's servants Gorman and Robertson, or either of them, having charge of the train called second 180, and that this negligence of this defendant's servants was the proximate cause of this collision, and to the injury to the plaintiff, then your verdict should be for the plaintiff. On the contrary, if you find that this accident and injury to the plaintiff was caused by the negligence of the plaintiff himself and that this negligence was the proximate cause of this collision, that is, the natural or ordinary result of plaintiff's own negligence, then you should find for the defendant. The plaintiff was obliged to use the same rule of care for his own safety as obligated the defendant company to use it for the plaintiff's safety. The law is absolutely just to each.

If you find, however, from this evidence, after, as I said, carefully considering all the facts and circumstances of it, in favor of the plaintiff, your next consideration would be the question of his damages. This is left by the law to the fair, just, unimpassioned and un-
372 biased judgment of you 12 men as men of affairs, applying that judgment to all the proven facts and circumstances bearing on the question of damages. You have a right to consider the character of the plaintiff's injuries, whether these injuries are temporary and have passed away or may pass away, or whether or not they are permanent; the pains of mind and body suffered by the plaintiff in consequence of his injury; the time he was confined to the hospital

and his home because of it; the loss of time and loss of ability to labor following this injury and because of it. You will consider on that question, too, his earning capacity before the accident and since; and taking into consideration all these circumstances as you are satisfied the fact is, you should give him such sum in damages as in the exercise of your judgment will compensate him for the injuries.

The answer alleges that the plaintiff was negligent in what he did or omitted to do in the care of the train of which he had control and that his negligence contributed to his injury. The burden of proof as to plaintiff's negligence in this respect alleged by the defendant is just as the burden of proof as to the negligence of the defendant alleged by the plaintiff; in the one case the burden is upon the plaintiff to prove to your satisfaction by a fair preponderance of the evidence that this collision occurred through the negligence of the defendant or its servants or agents, and he must prove that by a fair preponderance or a fair overweight of the testimony. On the other hand the defendant has alleged that the plaintiff was negli-

373 gent and is bound by the same rule to show by a fair preponderance or a fair overweight of the testimony that the plaintiff's negligence either caused or contributed to his own injury.

Now, under the law under which this case is being tried—the act of congress—if you find from the evidence that the plaintiff was guilty of any negligence which contributed to his injury—this negligence will not defeat the plaintiff's right to a recovery, but under the act of congress in assessing the plaintiff's damages, you must diminish the damages in the proportion as you find it to be, the defendant company's—that is, the carrier's—negligence, bore to the combined negligence of both the plaintiff and the defendant.

Gentlemen, that is practically everything that I have to say to you on the question of the law. Of course, as I have said, all the facts are with you.

If you find for the plaintiff, the form of your verdict will be we, the jury, find for the plaintiff and assess his damages at the sum, which under the facts as you find them, and the law as I have given you, he is entitled to recover. If your verdict is unanimous it will be signed by the foreman of the jury. If, however, after being in retirement from the court room 12 hours you have failed to reach a unanimous conclusion, then any ten members of the jury may form the verdict and declare what the verdict shall be—ten or eleven—and those ten or eleven which under such circumstances find a verdict, will each sign his name to the conclusion, the verdict.

374 Now gentlemen, something has been said in argument about the facts of this case that we are considering occurring in the state of Kentucky, and that the defendant is an Illinois corporation and the plaintiff is a citizen of Kentucky. All I have to say to you, gentlemen, I can say in a very few words: Both the plaintiff and the defendant company are rightfully and lawfully before this Court, and I invoke for both a careful consideration of this case and a fair and just verdict, based on the evidence alone and on the law, and I confidently expect such action at your hands. Take the case gentlemen.

A bailiff was sworn to take charge of the jury, and a stay of proceedings was granted for forty days.

Mr. Hoke: The defendant excepts to the portion of the Court's charge in which the Court stated in effect that plaintiff was at the time of the accident engaged in interstate commerce within the meaning of the so-called Federal Liability Act.

On the afternoon of February 24, 1914, at 2:00 o'clock, the jury returned a verdict in favor of the plaintiff in the sum of $12,000.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

ROBERT H. PEERY, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Stipulation.

It is hereby stipulated that the foregoing transcript, consisting of 254 pages of typewritten matter, together with certain papers
375 and drawings known respectively as Plaintiff's Exhibit "A" and Defendant's Exhibits "1" and "2," which are now in the possession of the Official Reporter of said Court, and may be considered a part hereof, may be taken as conformable to the truth and as constituting all the evidence offered or introduced at the trial of the above entitled action; also the charge of the court and all objections, rulings, orders and all other proceedings had upon the trial of said action, and that the same may be settled and allowed as the settled case in said action, without notice.

Dated April 20, 1914.

S. A. ANDERSON,
Attorney for Plaintiff.
BUTLER & MITCHELL,
Attorneys for Defendant.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

ROBERT H. PEERY, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Order Settling Case.

I hereby certify that the foregoing transcript, consisting of 254 pages of typewritten matter, together with certain papers and drawings known respectively as Plaintiff's Exhibit "A" and Defendant's

Exhibits "1" and "2," which are now in the possession of the official reporter of said court, and may be considered a part hereof, may be taken as comformable to the truth and as constituting all the evidence offered or introduced at the trial of the above entitled
376 action; also the charge of the court and all objections, rulings, orders and all other proceedings had upon the trial of said action, and I hereby settle and allow the same as and for the settled case herein.

Dated April 20th, 1914.

WILLIAM LOUIS KELLY,
District Judge.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

ROBERT H. PEERY, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Notice of Motion for Judgment Notwithstanding Verdict, or for a New Trial.

To Samuel A. Anderson, Esq., Attorney for Plaintiff, St. Paul, Minnesota:

Please take notice that at the Court House, in the City of St. Paul, Minnesota, at a special term of said Court, to be held on the 18th day of April, 1914, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the above named defendant will move the court for an order setting aside the verdict heretofore rendered herein, and directing that judgment be entered in favor of defendant herein, notwithstanding said verdict, upon the ground that the evidence herein wholly fails to establish that at the time of the happening of the accident involved herein plaintiff was either employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act (Act of Congress, April 22, 1908, 33 Stat. 65), and that consequently plaintiff is not entitled to recover against the defendant herein.

377 You will also please take notice that defendant will at said time and place further move the court for an order, in the event that said motion for judgment in defendant's favor notwithstanding the verdict herein shall be denied, setting aside the verdict heretofore rendered herein and granting a new trial herein upon the following grounds:

I.

That the verdict is not justified by the evidence, because the evidence is not sufficient to justify a finding that plaintiff at the time of the happening of the accident involved herein was either employed or engaged in interstate commerce within the meaning of the so-

called Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat. 65), and consequently is not sufficient to justify a recovery by plaintiff herein.

II.

That the verdict is contrary to law because the evidence wholly fails to establish that plaintiff was at the time of the happening of the accident involved herein either employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat., 65).

III.

The court erred in charging the Jury, as follows:

"Now the answer in this case, gentlemen, admits the incor-
378 poration and general business of the defendant railroad company, and while it puts at issue the question whether the defendant was engaged at the time of the accident in carrying on what familiarly is called interstate commerce, this question as to its character has already been to the Supreme Court of this state upon an appeal heretofore taken upon certain questions raised here at a former trial and the Supreme Court has held, upon questions substantially as I understand the facts are here today, that this defendant railroad company was in fact engaged in what is known as interstate commerce and that this plaintiff was, as its servant, engaged also in interstate commerce, and as I recall, counsel for the defendant in his address to the jury has said that there is substantially no difference between the facts in this case as they appear here upon this trial and the facts as they were passed upon by the Supreme Court of this state, and therefore it becomes my duty to say to you that so far as the law of this case is concerned, you will judge the plaintiff's case and the defendant's also, by the act of congress regulating what is known as interstate commerce, and the plaintiff—each party—is entitled to the rights and to the benefits conferred by that act."

Because, in so charging the jury, the court in effect instructed the jury that the rules of law embodied in the so-called Employers' Liability Act (Act of Congress April 22, 1908, 35 Stat. 65) were applicable to this case, which was erroneous, because the evidence fails to establish that plaintiff was, at the time of the happening
of the accident involved herein, either employed or engaged
379 in interstate commerce within the meaning of said Federal Employers' Liability Act.

IV.

The Court erred in itself determining as a matter of law, instead of submitting to the jury for determination, the question whether plaintiff was at the time of the happening of the accident involved herein employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act (Act of Congress April 22nd, 1908, 35 Stat. 65); and in assuming in its

instructions to the jury, as above set forth, as a matter of fact, that the plaintiff was employed in interstate commerce at the time of his injury; and in stating in said instructions the conditions or right in plaintiff to recover without including therein proof that plaintiff was at the time of his injury actually employed in interstate commerce.

V.

The Court erred in so construing the Federal Employers' Liability Act (Act of Congress April 22nd, 1908, 35 Stat. 65) as permitting the Court, under the facts proven and stipulated, to decide as a matter of law that the plaintiff was at the time employed in interstate commerce, and to so instruct the jury as to permit a verdict for the plaintiff without finding that he was employed in interstate commerce at the time he was injured.

380 VI.

The Court erred in construing the Federal Employers' Liability Act (Act of Congress April 22nd, 1908, 35 Stat. 65) to apply to an employe of the defendant employed in the work being done by the plaintiff at the time he was injured.

VII.

The Court erred in instructing the jury as above set forth, in ignoring the evidence introduced by the defendant explaining the character of the plaintiff's employment at the time he received his injury, or in assuming, as a matter of fact, that under such evidence the plaintiff was at said time employed in interstate commerce.

VIII.

The Court erred in charging the jury as follows:

"Now, under the law under which this case is being tried—the act of congress—if you find from the evidence that the plaintiff was guilty of any negligence which contributed to his injury—this negligence will not defeat the plaintiff's right to a recovery, but under the act of congress in assessing the plaintiff's damages, you must diminish the damages in the proportion as you find it to be, the defendant company's—that is, the carrier's—negligence, bore to the combined negligence of both the plaintiff and the defendant."

Because in so charging the jury, the court erroneously construed the provisions of the so-called Federal Employers' Liability Act (Act of Congress April 22, 1905, 35 Stat. 65) with respect to
381 the matter of contributory negligence.

IX.

Errors of law occurring at the trial and duly excepted to at the time.

X.

The Court erred in charging the jury as follows:

"And while said locomotive engine and train, with the plaintiff thereon, in the performance of his duties, was being thus run and operated, the defendant and certain of its servants and agents, in charge thereof, carelessly ran another of defendant's locomotive engines along and over said track, and in a northerly direction and up to and against the locomotive engine and train upon which the plaintiff was riding and carelessly caused the said two trains to collide with great force and violence and carelessly caused the same to be broken and crushed and carelessly caused said plaintiff to be caught in said collision and wreckage and then and there very severely injured; that said collision and injuries were caused through the carelessness of the defendant and its servants and agents in charge of said other engine, and that under and pursuant (I need not read this, the common law of Kentucky, is out of it) the defendant was liable and responsible for the negligent acts, etc. That the plaintiff at no time knew, and that he had no means of knowing, that said other engine was approaching the train upon which the plaintiff was riding or likely to collide with the same. He alleges fur-
382 ther that at the time of the accident he was 38 years of age, an experienced and capable railroad man; that he had been engaged in railroading for many years and that he was earning as such conductor and was capable of earning wages averaging at least $120 per month. That previous to said accident he had always been in good health; that by said accident he was severely and permanently injured upon and about his chest and back, and one of his shoulders; that his collar bone was broken; that he received a very severe nervous shock; that he has been totally disabled and incapacitated ever since said accident and has continuously suffered pain and anguish both of mind and body and that the injuries thus received as the plaintiff is informed and verily believes, are permanent and that he will, during the rest of his life, to a very large degree, be disabled and incapacitated and that he is informed and verily believes he will never be able to again engage in any lucrative occupation save and except in a slight degree, and as he is informed and verily believes he will suffer great pain and anguish both of body and mind. He then alleges that by reason of these facts, he has been damaged by the defendant in the sum of $25,000 and he demands judgment in that sum."

XI.

Material evidence newly discovered, which, with reasonable diligence, could not have been found and produced at the trial.

383 XII.

Excessive damages appearing to have been given under the influence of passion or prejudice.

The said motions will be based upon the settled case here, the annexed affidavits and upon all the files and records of the proceedings had in the above entitled cause.

BUTLER & MITCHELL,
Attorneys for Defendant.

624 Endicott Building, St. Paul, Minnesota.

Affidavit of M. E. Seay.

Affiant states that he resides on a farm nine miles northwest of Mayfield, Kentucky, and he further states that he has been personally acquainted with Robert H. Peery since boyhood and that he has always been known to be a hump-shouldered and round-backed man and always walked with his head forward and his back humped, and was known in the community in which he lived for several years as being a badly humped or round-shouldered man, and he further states that he was known among his acquaintances in that community as being a hump-backed man and was called "Humpy" on account of his extreme round-shoulders and humped back.

M. E. SEAY.

(Jurat.)

384 *Affidavit of T. M. Huddlesten.*

The affiant T. M. Huddlesten makes oath that he is and has been a resident of Graves County, Ky., for many years and that his place of residence is and was in the community in which Robert H. Peery was raised and that he is also personally acquainted with all of the following parties named herein, who are and have been residents of the same neighborhood and community for many years and that all of said parties are prominent and reputable and respectable farmers and business men and are and have been in a position to know and be acquainted with the said Robert H. Peery, and he further states that he is now a merchant and Notary Public in and for the County of Graves, State of Kentucky, and that for several years was a Deputy County Court Clerk of said Magisterial District and County, and that all of the following parties acknowledged and were sworn before signing affidavits given by them with reference to the physical condition of the said Robert H. Peery:

C. C. Rust, O. F. Cargill, Luther Rust, J. E. Goode, R. L. Leek, J. B. Mitchell, J. M. Reynolds, Era Gupton, A. L. White, Elmer White, A. P. Huddlesten, J. H. Reeves, R. H. Goode, L. J. Russ, Chas. E. Baldree, A. L. Smith, R. A. Peeples, J. W. Edwards, Cloyes Edwards, J. H. Davis, G. F. Garnett, T. H. Garnett, J. W. Allcock, A. W. Garnett, L. Staten, W. A. Allcock, David Record, E. S. Barriger, E. T. Mitchell, J. V. Sanderson, J. F. Bagby, W. T.
385 Crews, R. D. Thompson, J. F. Huddlesten, I. T. Vourtney, James Crews, S. D. Ward, J. E. Houser, F. E. Bement.

T. M. HUDDLESTEN.

(Jurat.)

X.

The Court erred in charging the jury as follows:

"And while said locomotive engine and train, with the plaintiff thereon, in the performance of his duties, was being thus run and operated, the defendant and certain of its servants and agents, in charge thereof, carelessly ran another of defendant's locomotive engines along and over said track, and in a northerly direction and up to and against the locomotive engine and train upon which the plaintiff was riding and carelessly caused the said two trains to collide with great force and violence and carelessly caused the same to be broken and crushed and carelessly caused said plaintiff to be caught in said collision and wreckage and then and there very severely injured; that said collision and injuries were caused through the carelessness of the defendant and its servants and agents in charge of said other engine, and that under and pursuant (I need not read this, the common law of Kentucky, is out of it) the defendant was liable and responsible for the negligent acts, etc. That the plaintiff at no time knew, and that he had no means of knowing, that said other engine was approaching the train upon which the plaintiff was riding or likely to collide with the same. He alleges fur-
382 ther that at the time of the accident he was 38 years of age, an experienced and capable railroad man; that he had been engaged in railroading for many years and that he was earning as such conductor and was capable of earning wages averaging at least $120 per month. That previous to said accident he had always been in good health; that by said accident he was severely and permanently injured upon and about his chest and back, and one of his shoulders; that his collar bone was broken; that he received a very severe nervous shock; that he has been totally disabled and incapacitated ever since said accident and has continuously suffered pain and anguish both of mind and body and that the injuries thus received as the plaintiff is informed and verily believes, are permanent and that he will, during the rest of his life, to a very large degree, be disabled and incapacitated and that he is informed and verily believes he will never be able to again engage in any lucrative occupation save and except in a slight degree, and as he is informed and verily believes he will suffer great pain and anguish both of body and mind. He then alleges that by reason of these facts, he has been damaged by the defendant in the sum of $25,000 and he demands judgment in that sum."

XI.

Material evidence newly discovered, which, with reasonable diligence, could not have been found and produced at the trial.

383 XII.

Excessive damages appearing to have been given under the influence of passion or prejudice.

The said motions will be based upon the settled case here, the annexed affidavits and upon all the files and records of the proceedings had in the above entitled cause.

BUTLER & MITCHELL,
Attorneys for Defendant.

624 Endicott Building, St. Paul, Minnesota.

Affidavit of M. E. Seay.

Affiant states that he resides on a farm nine miles northwest of Mayfield, Kentucky, and he further states that he has been personally acquainted with Robert H. Peery since boyhood and that he has always been known to be a hump-shouldered and round-backed man and always walked with his head forward and his back humped, and was known in the community in which he lived for several years as being a badly humped or round-shouldered man, and he further states that he was known among his acquaintances in that community as being a hump-backed man and was called "Humpy" on account of his extreme round-shoulders and humped back.

M. E. SEAY.

(Jurat.)

384 *Affidavit of T. M. Huddlesten.*

The affiant T. M. Huddlesten makes oath that he is and has been a resident of Graves County, Ky., for many years and that his place of residence is and was in the community in which Robert H. Peery was raised and that he is also personally acquainted with all of the following parties named herein, who are and have been residents of the same neighborhood and community for many years and that all of said parties are prominent and reputable and respectable farmers and business men and are and have been in a position to know and be acquainted with the said Robert H. Peery, and he further states that he is now a merchant and Notary Public in and for the County of Graves, State of Kentucky, and that for several years was a Deputy County Court Clerk of said Magisterial District and County, and that all of the following parties acknowledged and were sworn before signing affidavits given by them with reference to the physical condition of the said Robert H. Peery:

C. C. Rust, O. F. Cargill, Luther Rust, J. E. Goode, R. L. Leek, J. B. Mitchell, J. M. Reynolds, Era Gupton, A. L. White, Elmer White, A. P. Huddlesten, J. H. Reeves, R. H. Goode, L. J. Russ, Chas. E. Baldree, A. L. Smith, R. A. Peeples, J. W. Edwards, Cloyes Edwards, J. H. Davis, G. F. Garnett, T. H. Garnett, J. W. Allcock, A. W. Garnett, L. Staten, W. A. Allcock, David Record, E. S. Barriger, E. T. Mitchell, J. V. Sanderson, J. F. Bagby, W. T.
385 Crews, R. D. Thompson, J. F. Huddlesten, I. T. Vourtney, James Crews, S. D. Ward, J. E. Houser, F. E. Bement.

T. M. HUDDLESTEN.

(Jurat.)

Affidavit of A. L. White.

The affiant states that he was personally acquainted with Robert H. Peery for several years before he began working for the railroad and that he was always a badly stooped man with his head forward, and was not erect and his movements were very slow at all times and in the community in which he lived before working for the railroad, he was called Humpy on account of his stooped condition.

A. L. WHITE.

(Jurat.)

Affidavit of R. D. Thompson.

The affiant states that he resided in the same community with Robert H. Peery before he entered the service of the railroad, and that Peery was always badly stooped with his head forward, and walked slow and was known to his neighbors and friends as Humpy.

R. D. THOMPSON.

(Jurat.)

386 *Affidavit of E. E. Mitchell.*

The affiant states that he has been personally acquainted with Robert H. Peery for several years and that Peery was badly stooped and not erect many years before 1911, and that in the community in which he resided before he began working for the railroad, that he was known to almost everybody as Humpy.

E. E. MITCHELL.

(Jurat.)

Affidavit of David Record.

The affiant states that he resided in the same community with Robert H. Peery for several years before he entered the service of the Illinois Central, and that Peery was always considered and in fact was badly stooped, with his head extending forward, and was termed Humpy by a great many people in that vicinity.

DAVID RECORD.

(Jurat.)

Affidavit of G. W. Allcock.

The affiant states that he has been personally acquainted with Robert H. Peery for several years and that Peery was badly stooped and not erect many years before 1911; and that in the community in which he resided before he began working for the railroad, that he was known to almost everybody as Humpy.

G. W. ALLCOCK.

(Jurat.)

387 *Affidavit of O. F. Cargill.*

The affiant states that he has been personally acquainted with Robert H. Peery for several years and that Peery was badly stooped and not erect many years before 1911, and that in the community in which he resided before he began working for the railroad, that he was known to almost everybody as Humpy.

O. F. CARGILL.

(Jurat.)

Affidavit of Luther Rust.

The affiant states that he resided in the same community with Robert H. Peery before he entered the service of the railroad and that Peery was always stooped, with his head forward, and walked slow and was known to his neighbors and friends as Humpy.

LUTHER RUST.

(Jurat.)

Affidavit of J. E. Goode.

The affiant states that he has been personally acquainted with Robert H. Peery for several years and that before he began working for the railroad that he was a round-shouldered man with his head extending forward and was called Humpy by people in the community.

J. E. GOODE.

(Jurat.)

388 *Affidavit of Era Lipton.*

The affiant states that he was personally acquainted with Robert H. Peery for several years before he began working for the railroad and that he was always a badly stooped man with his head forward, and was not erect and his movements were very slow at all times and in the community in which he lived before working for the railroad, he was called Humpy on account of his stooped condition.

ERA LIPTON.

(Jurat.)

Affidavit of L. S. Staten.

The affiant states that he resided in the same community with Robert H. Peery before he entered the service of the railroad, and that Peery was always badly stooped with his head forward, and walked slow and was known to his neighbors and friends as Humpy.

L. S. STATEN.

(Jurat.)

Affidavit of Elmer White.

The affiant states that he was personally acquainted with Robert H. Peery for several years before he began working for the railroad and that he was always a badly stooped man with his head forward and was not erect and his movements were very slow at all
389 times, and in the community in which he lived before working for the railroad, he was called Humpy on account of his stooped condition.

ELMER WHITE.

(Jurat.)

Affidavit of A. P. Huddleston.

The affiant states that he was personally acquainted with Robert H. Peery for several years before he began working for the railroad and that he was always a badly stooped man with his head forward, and was not erect and his movements were very slow at all times, and in the community in which he lived before working for the railroad, he was called Humpy on account of his stooped condition.

A. P. HUDDLESTON.

(Jurat.)

Affidavit of A. W. Garrett.

The affiant states that he has been personally acquainted with Robert H. Peery for several years and that before he began working for the railroad that he was a round-shouldered man, with his head extending forward and was called Humpy by people in the community.

A. W. GARRETT.

(Jurat.)

390 *Affidavit of S. D. Ward.*

The affiant states that he was personally acquainted with Robert H. Peery for several years before he began working for the railroad and that he was always a badly stooped man, with his head forward, and was not erect and his movements were very slow at all times, and in the community in which he lived before working for the railroad, he was called Humpy on account of his stooped condition.

S. D. WARD.

(Jurat.)

Affidavit of J. H. Reeves.

The affiant states that he resided in the same community with Robert H. Peery for several years before he entered the service of

the Illinois Central, and that Peery was always considered and in fact was badly stooped, with his head extending forward, and was termed Humpy by a great many people in that vicinity.

J. H. REEVES.

(Jurat.)

Affidavit of R. H. Goode.

The affiant states that he resided in the same community with Robert H. Peery for several years before he entered the service of the Illinois Central, and that Peery was always considered and in fact was badly stooped, with his head extending forward,
391 and was termed Humpy by a great many people in that vicinity.

R. H. GOODE.

(Jurat.)

Affidavit of L. J. Rust.

The affiant states that he resided in the same community with Robert H. Peery for several years before he entered the service of the Illinois Central, and that Peery was always considered and in fact was badly stooped, with his head extending forward, and was termed Humpy by a great many people in that vicinity.

L. J. RUST.

(Jurat.)

Affidavit of Charles E. Baldree.

The affiant states that he resided in the same community with Robert H. Peery for several years before he entered the service of the Illinois Central, and that Peery was always considered and in fact was badly stooped, with his head extending forward, and was termed Humpy by a great many people in that vicinity.

CHARLES E. BALDREE.

(Jurat.)

Affidavit of J. M. Reynolds.

The affiant states that he has been personally acquainted with Robert H. Peery for several years and that before be began
392 working for the railroad that he was a round-shouldered man, with his head extending forward, and was called Humpy by people in the community.

his
J. M. X REYNOLDS.
mark.

(Jurat.)

Affidavit of A. L. Smith.

The affiant states that he resided in the same community with Robert H. Peery for several years before he entered the service of

the Illinois Central, and that Peery was always considered and in fact was badly stooped, with his head extending forward, and was termed Humpy by a great many people in that vicinity.

A. L. SMITH.

(Jurat.)

Affidavit of James Cruse.

The affiant states that he has been personally acquainted with Robert H. Peery for several years and that before he began working for the railroad that he was a round-shouldered man, with his head extending forward and was called Humpy by people in the community.

his
JAMES X CRUSE.
mark.

(Jurat.)

393 *Affidavit of I. T. Courtney.*

The affiant states that he is and has been personally acquainted with Robert H. Peery for several years on account of residing in the same community in which Peery resided before he entered the service of the railroad, and that Peery was always a stooped shouldered man, with his head forward, and never was erect and he was called Humpy by many people on account of the shoulders being so badly stooped.

I. T. COURTNEY.

(Jurat.)

Affidavit of J. F. Bagby.

The affiant states that he resided in the same community with Robert H. Peery before he entered the service of the railroad, and that Peery was always badly stooped, with his head forward, and walked slow and was known to his neighbors and friends as Humpy.

J. F. BAGBY.

(Jurat.)

Affidavit of J. F. Huddleston.

The affiant states that he has been personally acquainted with Robert H. Peery for several years and that Peery was badly stooped and not erect many years before 1911, and that in the community in which he resided before he began working for the rail-
394 road, that he was known to almost everybody as Humpy.

J. F. HUDDLESTON.

(Jurat.)

Affidavit of J. E. Houser.

The affiant states that he has been personally acquainted with Robert H. Peery for several years and that before he began working

for the railroad that he was a round-shouldered man, with his head extending forward, and was called Humpy by people in the community.

J. E. HOUSER.

(Jurat.)

Affidavit of J. V. Anderson.

The affiant states that he resided in the same community with Robert H. Peery before he entered the service of the railroad, and that Peery was always badly stopped, with his head forward, and walked slow and was known to his neighbors and friends as Humpy.

J. V. ANDERSON.

(Jurat.)

Affidavit of J. B. Rust.

The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that for years before Peery entered the service of the railroad, his shoulders were stooped
395 and his head forward and never was known as an erect man, but was always considered and called Humpy in his home neighborhood.

J. B. RUST, *Farmer.*

(Jurat.)

Affidavit of W. A. Allcock.

The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that before he was alleged to have been injured in a wreck on the Illinois Central in 1911, that Peery was a badly stooped man, with his head extending forward and was not to be called an erect man at any time.

W. A. ALLCOCK.

(Jurat.)

Affidavit of T. H. Garnett.

The affiant states that he is and has been personally acquainted with Robert H. Peery, plaintiff, for several years, and that he was a stooped shouldered man for years before he entered the service of the railroad and that he resided in the same community before Peery entered the railroad service and that Peery's movements were always slow, with his head forward.

T. H. GARNETT.

(Jurat.)

396 *Affidavit of C. C. Rust.*

The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that before he was alleged to

have been injured in a wreck on the Illinois Central in 1911, that Peery was a badly stooped man, with his head extending forward and was not to be called an erect man at any time.

C. C. RUST.

(Jurat.)

Affidavit of R. L. Leek.

The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that before he was alleged to have been injured in a wreck on the Illinois Central in 1911, that Peery was a badly stooped man, with his head extending forward and was not to be called an erect man at any time.

R. L. LEEK.

(Jurat.)

Affidavit of J. B. Mitchell.

The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that before he was alleged to have been injured in a wreck on the Illinois Central in 1911, that Peery was a badly stooped man, with his head extending forward and was not to be called an erect man at any time.

J. B. MITCHELL.

(Jurat.)

397 *Affidavit of Ira A. Peeples.*

The affiant states that he is and has been personally acquainted with Robert H. Peery, plaintiff, for several years, and that he was a stooped shouldered man for many years before he entered the service of the railroad, and that he resided in the same community before Peery entered the railroad service and that Peery's movements were always slow, with his head forward.

IRA A. PEEPLES.

(Jurat.)

Affidavit of J. H. Davis.

The affiant states that he is and has been personally acquainted with Robert H. Peery, plaintiff, for several years, and that he was a stooped shouldered man for many years before he entered the service of the railroad, and that he resided in the same community before Peery entered the railway service, and that Peery's movements were slow, with his head forward.

J. H. his X mark DAVIS.

(Jurat.)

Affidavit of Cloyes Edwards.

The affiant states that he is and has been personally acquainted with Robert H. Peery, plaintiff, for several years, and that he was a stooped shouldered man for years before he entered the service of the railroad, and that he resided in the same community before Peery entered the railroad service, and that Peery's movements were always slow, with his head forward.

398

CLOYES EDWARDS.

(Jurat.)

Affidavit of J. W. Edwards.

The affiant states that he is and has been personally acquainted with Robert H. Peery, plaintiff, for several years, and that he was a stooped shouldered man for years before he entered the service of the railroad, and that he resided in the same community before Peery entered the railroad service and that Peery's movements were always slow, with his head forward.

J. W. EDWARDS.

(Jurat.)

Affidavit of G. F. Garnett.

The affiant states that he is and has been personally acquainted with Robert H. Peery, plaintiff, for several years, and that he was a stooped shouldered man for years before he entered the service of the railroad, and that he resided in the same community before Peery entered the railroad service and that Peery's movements were always slow, with his head forward.

G. F. GARNETT.

(Jurat.)

399

Affidavit of F. E. Bement.

The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that before he was alleged to have been injured in a wreck on the Illinois Central in 1911, that Peery was a badly stooped man, with his head extending forward and was not to be called an erect man at any time.

F. E. BEMENT.

(Jurat.)

Affidavit of E. S. Barriger.

The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that before he was alleged to have been injured in a wreck on the Illinois Central in 1911, that Peery was a bady stooped man, with his head extending forward and was not to be called an erect man at any time.

E. S. BARRIGER.

(Jurat.)

Affidavit of C. H. Atas.

The affiant makes oath that he has been personally acquainted with Robert H. Peery for several years before Peery went to work for the railroad, and that Peery way round shouldered, short neck, with head forward and never was an erect man and was always slow in his movements.

C. H. ATAS.

(Jurat.)

400 *Affidavit of Charles Basen.*

The affiant makes oath that he has personally known Robert H. Peery for several years, and that many years before he entered the service of the railroad he was round-shouldered, short neck, with head forward and never erect and was slow in his movements.

CHARLES BASEN.

(Jurat.)

Affidavit of Emma Huddleston.

The affiant makes oath that he has been personally acquainted with Robert H. Peery for several years before Peery went to work for the railroad, and that Peery was round shouldered, short neck, with head forward and never was an erect man and was always slow in his movements.

EMMA HUDDLESTON.

(Jurat.)

Affidavit of T. A. Houle.

The affiant makes oath that he has been personally acquainted with Robert H. Peery for many years and that before he entered the service of the railroad, he lived in the same community and that Peery was always a slow walker, short neck, head forward and stooped shoulders.

T. A. HOULE.

(Jurat.)

401 *Affidavit of Fred Taylor.*

The affiant makes oath that he has been personally acquainted with Robert H. Peery for many years and that before he entered the service of the railroad, he lived in the same community and that Peery was always a slow walker, short neck, head forward and stooped shoulders.

FRED TAYLOR.

(Jurat.)

Affidavit of J. W. Coleman.

The affiant states that he has known and has been personally acquainted with Robert H. Peery for several years, and in fact several years before Peery entered the railroad service, and that Peery was at all times stooped shouldered and his head forward and walked very slow and never was an erect man.

J. W. COLEMAN.

(Jurat.)

Affidavit of J. E. Howle.

The affiant states that he has known and has been personally acquainted with Robert H. Peery for several years, and in fact several years before Peery entered the railroad service, and that Peery was at all times stooped shouldered and his head forward and walked very slow and never was an erect man.

J. E. HOWLE.

(Jurat.)

402 *Affidavit of T. M. Huddleston.*

The affiant states that he has known and has been personally acquainted with Robert H. Peery for several years, and in fact several years before Peery entered the railroad service, and that Peery was at all times stooped shouldered and his head forward and walked very slow and never was an erect man.

T. M. HUDDLESTON.

(Jurat.)

Affidavit of W. E. Lowe.

The affiant states that he is a farmer and resides in Graves Co., Ky., and that he has been personally acquainted with Robert H. Peery for several years as he resided near the former home of Peery, and that Peery was always a badly round-shouldered man and when riding horse back would be badly stooped and he was very slow in his movements at all times.

W. E. LOWE.

(Jurat.)

Affidavit of M. T. Cruse.

The affiant states that he lived in the same community with Robert H. Peery for several years before Peery entered the railroad service, and that he was a stooped shouldered man, and was not erect, and was considered in the entire country as a hump-back man,
403 and his movements were always slow.

his
M. T. CRUSE.
mark.

(Jurat.)

Affidavit of Fred Jackson.

The affiant makes oath that he has personally known Robert H. Peery for several years, and that many years before he entered the service of the railroad, he was round shouldered, short neck, with head forward and never erect and was slow in his movements.

FRED JACKSON.

(Jurat.)

Affidavit of E. H. Orr.

The affiant makes oath that he has personally known Robert H. Peery for several years, and that many years before he entered the service of the railroad, he was round shouldered, short neck, with head forward and never erect and was slow in his movements.

E. H. ORR.

(Jurat.)

404 STATE OF KENTUCKY,
County of Graves:

Certificate.

I, J. W. Wilson, Clerk of the Circuit Court in and for Graves County, in the State of Kentucky, hereby certify that J. C. Robbins, whose genuine signature appears to the jurate to the separate affidavits of E. N. Jackson and E. H. Orr, hereto attached, was on the 10th day of April, 1913, by an order of the Graves Circuit Court duly and regularly appointed an Examiner in and for Graves County, Kentucky, and was duly qualified as required by law.

Witness my hand and the official seal of said court, this the 24th day of March, 1914.

[Seal Graves Circuit Court, Kentucky.]

J. W. WILSON,
Clerk of the Graves Circuit Court.

Affidavit of M. C. Payne.

The affiant, M. C. Payne, states that he is the claim agent of the Illinois Central Railroad Company, and that he personally is acquainted with the place of residence and occupation of the following parties giving affidavits to be used in the suit of Robert H. Peery v. Illinois Central, pending in the District Court of Ramsey County, Minn., and that C. H. Ater, Charlie Boren, Emmett Huddle-
405 ston, T. A. Howle, Fred Taylor, J. W. Coleman, J. E. Howle, T. W. Huddleston, E. N. Jackson and E. H. Orr and M. E. Seay are farmers and reside in the community in which Robert H. Peery was raised and did reside for many years prior to entering the service of the Illinois Central Railroad, and said community is located

from two to five miles northwest of the town of Boaz, Ky., and near the line between the Counties of Graves and McCracken.

M. C. PAYNE.

(Jurat.)

Affidavit of M. H. Robertson.

The affiant M. H. Robertson says he is and has been station agent at Mayfield, Ky., for several years, and that he has been personally acquainted with Rob't H. Peery, formerly a conductor for the Illinois Central Railroad Company for several years, and that Peery was always a badly round-shouldered man, with head extending forward, and could easily be called a hump-back man, and was slow movement, and fat, and was not erect at any time.

M. H. ROBERTSON.

(Jurat.)

Affidavit of W. R. Dunn.

The affiant, W. R. Dunn, states that he is and has been agent of the Illinois Central Railroad at Wingo, Ky., for several years,
406 and that he is and has been personally acquainted with former Conductor Robert H. Peery for several years, and that he has always known Peery to be a man with round shoulders and to a very great degree humped, with his head forward and shoulders very round and very slow in his movements and could not be called an erect man at any time during the years that he knew him.

W. R. DUNN.

(Jurat.)

Affidavit of J. A. Neumer.

The affiant states that he has been personally acquainted with Robert H. Peery for several years and that prior to his accident, he was a round-shouldered man, with his head forward and was never an erect man, and was considered badly stooped; that his movements were very slow at all times.

J. A. NEUMER, *Conductor.*

(Jurat.)

Affidavit of E. L. Harrington.

The affiant states that he is and has been personally acquainted with Robert H. Peery for several years and that he was stooped shouldered before he was injured in 1911, and that he was always slow about his movements.

E. L. HARRINGTON, *Engineer.*

(Jurat.)

407 *Affidavit of T. E. Corcran.*

The affiant states that he has been personally acquainted with Robert H. Peery for about seven years, and that previous to Peery's accident he was a round shouldered man, with his head extending forward and was not an erect man at any time.

T. E. CORCRAN, *Flagman.*

(Jurat.)

Affidavit of Clyde Payne.

The affiant states that he was personally acquainted with Robert H. Peery before his accident in 1911, and that he was always stoop shouldered and head forward and was not an erect man at any time.

CLYDE PAYNE, *Conductor.*

(Jurat.)

Affidavit of J. B. Dalepiti.

The affiant states that he has known Robert H. Peery for seven years and that he was always a round shouldered man with his head extending forward as he had a very short, fat neck, and he never was an erect or fast walking men.

J. B. DALEPITI, *Conductor.*

(Jurat.)

408 *Affidavit of J. N. Moore.*

The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that before his accident in 1911, his shoulders were stooped, and he was not an erect man at any time and always walked very slow.

J. N. MOORE.

(Jurat.)

Affidavit of Al Hatch.

The affiant states that he has known Robert Peery for several years and that he was always stooped shouldered and was never an erect man in his observation and that his movements were very slow at all times.

AL HATCH, *Engineer.*

(Jurat.)

Affidavit of Juri Donaher.

The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that his shoulders were al-

ways very round and his head extending forward and stooped before his accident in 1911.

JURI DONAHER, *Flagman.*

(Jurat.)

409 *Affidavit of W. E. Barkley.*

The affiant states that he has been personally acquainted with Robert H. Peery for about seven years and that his shoulders were always very round and his head forward and stooped and that he never was an erect man.

W. E. BARKLEY, *Engineer.*

(Jurat.)

Affidavit of C. O. Man.

The affiant states that he has been personally acquainted with Robert H. Peery, former conductor on the I. C. R. R., for several years and that before his accident in 1911, Peery was a round shouldered and stooped man with his head extending forward and never was an erect man and his movements were always very slow.

C. O. MAN, *Conductor.*

(Jurat.)

Affidavit of W. S. Stavely.

The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that his shoulders were very round and his head forward and stooped before his accident in 1911.

W. S. STAVELY.

(Jurat.)

410 *Affidavit of George Hoke.*

George Hoke, being first duly sworn, deposes and says that he is one of the attorneys for defendant, and as such attorney, he had sole charge of directing the preparations made by defendant for the second trial of this action; that a diligent effort was made adequately to prepare this case for trial by the regular employees of the defendant's claim department and by other persons employed especially for such purpose, but because of the great distance of Kentucky from Minnesota, and the unfamiliarity of the people in Kentucky with the conditions in Minnesota affecting the trial of personal injury actions, great difficulty was experienced in obtaining the sort of proof necessary to present in defending this case. It was only when subsequent to the rendition of the large verdict herein, and news of such fact was generally spread among the acquaintances, friends and relatives of plaintiff in Kentucky that a large number of the people, apparently shocked by the injustice of the verdict, based as it is largely upon the contention that plaintiff was prior to the accident

an erect man, made known their willingness, in the interests of truth, to disclose the evidence contained in the annexed affidavits.

Defendant did not know prior to said trial, although it had diligently sought evidence as to plaintiff's condition prior to the accident, in which plaintiff claims to have been injured, that plaintiff had for many years prior to his entering the employ of de-
411 fendant, been familiarly known among his friends as "Humpy," or that he had been in fact since youth a stooped, uncommonly roundbacked man.

GEORGE HOKE.

(Jurat.)

Affidavit of William G. McFadden.

Affiant, William G. McFadden, being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that for about twenty years he has owned and operated a photograph studio in said city; and that on the (30th) Thirtieth day of April, 1910, he took the photograph of Robert H. Peery, and that when said photograph was taken the said Robert H. Peery was seated in his normal position and that the two photographs hereto attached and marked "Exhibits A and B," to which affiant has this day signed his name upon the back thereof, are true and correct photographs of said Robert H. Peery at said time.

WM. G. McFADDEN.

(Jurat.)

Affidavit of Katie Cook.

Katie Cook being first duly sworn deposes and says, that she resides in Paducah, Kentucky; and that she has been well acquainted with Robert H. Peery, the plaintiff in the above entitled action, for over eighteen years, and that previous to the accident to recover damages for which this action was brought he was an erect
412 and normal man; and that he was not stoop shouldered; and that she has never heard him called or designated by any such nick-name as "humpy."

KATIE COOK.

(Jurat.)

Affidavit of John D. Wallace.

John D. Wallace being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he has for the past eight years been well acquainted with Robert H. Peery, the plaintiff in the above entitled action; and that prior to the accident to recover damages for which this action was brought he was an erect and normal man in appearance and not stoop shouldered as he is now; and that he has never heard him called or designated by any such nick name as "humpy."

JOHN D. WALLACE.

(Jurat.)

Affidavit of Bernie Brown.

Bernie Brown being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that for the past eight years he has known Robert H. Peery intimately; and that prior to 1911 Mr. Peery was an erect and normal man, not stoop shouldered; and that he has never heard him called or designated as "humpy."

BERNIE BROWN.

(Jurat.)

413 *Affidavit of Thomas H. Torian.*

Thomas H. Torian being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he has been well acquainted with Robert H. Peery, the plaintiff, for about twenty years; and that he has been in swimming with him on many occasions, has wrestled and boxed with him; and that previous to the accident to recover damages for which this action was brought he was erect and straight as to back and shoulders; and that he was not by any means a stoop shouldered man; and that he has never known or heard of him being called or designated by such a nick-name as "humpy."

THOMAS H. TORIAN.

(Jurat.)

Affidavit of James N. Moore.

James N. Moore being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he is in the grocery business in Paducah; and that he has been intimately acquainted with Robert H. Peery, the plaintiff in the above entitled action for about twelve years; and that prior to the accident to recover damages for which this action was brought he was an erect and normal man in appearance and not in the least stoop shouldered; and that he has never heard him called or spoken of or designated by the nick-name of "humpy."

JAMES N. MOORE.

(Jurat.)

414 *Affidavit of Harvey S. Tyner.*

Harvey S. Tyner being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he has been well acquainted with Robert H. Peery, the plaintiff in the above entitled action, for about twenty-three years; and that he attended the same school with Robert H. Peery; and that previous to the accident for which this action is brought to recover damages he was an erect, normal man in appearance; and that he was not in the least stoop shoul-

dered; and that this affiant has never heard him called or designated by any such nick-name as "humpy."

HARVEY S. TYNER.

(Jurat.)

Affidavit of Harvey L. Gamblin.

Harvey L. Gamblin being first duly sworn deposes and says that he resides in Paducah, Ky.; and that he has intimately known Robert H. Peery, the plaintiff in the above entitled action, for about seven years; and that previous to the accident for which he is seeking damages in the above entitled action, he was an erect and normal man in appearance; and that he was not stoop shouldered; and that he has never heard him called or designated by any such nick-name as "humpy."

HARVEY L. GAMBLIN.

(Jurat.)

415 *Affidavit of Kill Wallace.*

Kill Wallace being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he is and for nine years has been well acquainted with the above named plaintiff and that previous to the time that he met with the accident to recover damage for which the above entitled action is brought he was an erect, normal man in appearance, and that he was not stoop shouldered, and that he has never heard him called or designated by any such nickname as "Humpy."

KILL WALLACE.

(Jurat.)

Affidavit of John A. Tyner.

John A. Tyner being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he has been well acquainted with the above named plaintiff, Robert H. Peery, and that previous to the time he met with the accident to recover damage for which this action was brought he was an erect, normal man in appearance, and that he was not a stoop shouldered man, and that he has known said Robert H. Peery for twenty-two years, and that he has never heard him called or designated by the nickname of "Humpy."

JOHN A. TYNER.

(Jurat.)

416 *Affidavit of Joseph S. Eddings.*

Joseph S. Eddings being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he has been well acquainted with the above named plaintiff, Robert H. Peery, for

about twenty-five years, and that previous to the time he met with the accident for which this action was brought he was an erect and normal man in appearance, and that he was not a stoop shouldered man, and that he has never heard him called or designated by nick-name of "humpy."

JOSEPH E. EDDINGS.

(Jurat.)

Affidavit of Cleve Gilliam.

Cleve Gilliam being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he has been well acquainted with the above named plaintiff, Robert H. Peery, for about nineteen years, and that prior to the accident for which this action was brought to recover damages he was an erect and normal man in appearance, and that he was not a stoop shouldered man, and that he had never heard him called or designated by any such nick-name as "humpy."

CLEVE GILLIAM.

(Jurat.)

Affidavit of Luther E. Webb.

Luther E. Webb being first duly sworn deposes and says
417 that he resides at Paducah, Kentucky; and that he is and has been for the past seven years well acquainted with the above named plaintiff, Robert H. Peery, and that prior to the accident to recover damages for which this action was brought he was an erect and normal man in appearance, and that he has never known him to be called or designated by the nick-name of "humpy."

LUTHER E. WEBB.

(Jurat.)

Affidavit of Ted Nicholson.

Ted Nicholson being first duly sworn deposes and says that he resides in Paducah, Kentucky; that he had been well acquainted with the above named plaintiff, Robert H. Peery, for about eighteen years, and that previous to the time that he met with the accident for which he is seeking to recover damage by this action he was an erect and normal man, and not a stoop shouldered man. This affiant further says that he has never heard said Robert H. Peery called or designated by any such nickname as "Humpy."

TED NICHOLSON.

(Jurat.)

Affidavit of Jerry C. Carney.

Jerry C. Carney being first duly sworn deposes and says he resides in Paducah, Kentucky; and that he has known the above

named plaintiff, Robert H. Peery, intimately, for sixteen
418 years; and that previous to the accident to recover damages for which this action was brought he was an erect and normal man in appearance; and that he was not stoop shouldered; and that he has never heard him called or designated by any such nick-name as "humpy."

JERRY C. CARNEY.

(Jurat.)

Affidavit of Walter H. Webb.

Walter H. Webb being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he has been intimately acquainted with Robert H. Peery, the plaintiff in the above entitled action; and that previous to the accident to recover damages for which this action was brought he was an erect and normal man in appearance, not at all stoop shouldered; and that he has never heard him called or designated by any such nick-name as "humpy."

WALTER H. WEBB.

(Jurat.)

Affidavit of William T. Pryor.

William T. Pryor being first duly sworn deposes and says he resides on a farm near the City of Paducah in the State of Kentucky; and that he has known Robert H. Peery intimately for about thirty years; and that previous to the accident to recover damages for which this action was brought he was an erect and normal man, healthy and strong; and that he was not in the least stoop
419 shouldered; and that he has never heard him called or designated by any such nick-name as "humpy."

WILLIAM T. PRYOR.

(Jurat.)

Affidavit of James P. Hart.

James P. Hart being first duly sworn deposes and says that he resides in Paducah, Ky.; and that he has known Robert H. Peery, the plaintiff in the above entitled action, for about eight years, that this acquaintance has been continuous and intimate; and that prior to the accident to recover damages for which this action was brought he was an erect and normal man in appearance, and that he was not stoop shouldered; and that he has never heard him called or designated by any such nick-name as "humpy."

JAMES P. HART.

(Jurat.)

Affidavit of John K. Harper.

John K. Harper being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he has known the plain-

tiff, Robert H. Peery, for the last seven years; and that previous to his accident in 1911, he was an erect and normal man in appearance; and that he was not a stoop shouldered man; and that he has never heard him called or designated as "humpy."

JOHN K. HARPER.

(Jurat.)

420 *Affidavit of Frank A. Rankin.*

Frank A. Rankin being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he is a druggist, owning and operating a drug store on Tennessee street in Paducah, Ky.; and that he has known Robert H. Peery, the plaintiff in the above entitled action, intimately for the last six years; and that prior to the accident to recover damages for which this action was brought he was an erect and normal man in appeareance and not stoop shouldered; and that he has never heard him called or designated by any such nickname as "humpy."

F. A. RANKIN.

(Jurat.)

Affidavit of Joseph Franks.

Joseph Franks being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he has lived in the neighborhood with and intimately known Robert H. Peery, the plaintiff in the above entitled action, for one year prior to the accident to recover damages for which this action was brought; and that during that year Robert H. Peery was an erect and normal man in appearance; and that he was not stoop shouldered; and that he has never heard him called or designated by any such nick-name as "humpy."

JOSEPH FRANKS.

(Jurat.)

421 *Affidavit of Thomas H. Angle.*

Thomas H. Angle being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he has been well acquainted with the above named plaintiff, Robert H. Peery, for about seven years, and that previous to the accident for which this action was brought to recover damages he was an erect and normal man in appearance and not a stoop shouldered man, and that he was never called or designated by any such nick-name as "humpy."

THOMAS H. ANGLE.

(Jurat.)

Affidavit of Griffin Nicholson.

Griffin Nicholson being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he has known the

plaintiff, Robert H. Peery, for about thirty-five years; and that prior to the accident to recover damages for which this action was brought he was erect as to back and shoulders; and not a stoop shouldered man; and that he has never heard him called or designated by any such nickname as "humpy."

GRIFFIN NICHOLSON.

(Jurat.)

Affidavit of Phillip H. Reboul.

Phillip H. Reboul, being first duly sworn deposes and says that he resides on a farm about five miles from Paducah, Ken-
422 tucky; and that he has known the plaintiff, Robert H. Peery, for about twenty years; and that previous to the accident to recover damages for which this action was brought he was erect and straight as to back and shoulders, and not a stoop shouldered man; and that he has never heard him called or designated by any such nick-name as "humpy."

P. H. REBOUL.

(Jurat.)

Affidavit of John B. Hall.

John B. Hall being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he is in the real estate business in that city; and that he has been intimately acquainted with the above named plaintiff, Robert H. Peery, for over twenty-five years; and that previous to the time he met with the accident to recover damages for which this action was brought, he was an erect and normal man in appearance; and that he was not stoop shouldered; and that he has never known him to be called by any such nick-name as "humpy."

JOHN B. HALL.

(Jurat.)

Affidavit of John W. Watts.

John W. Watts being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he is a clerk in the
423 postoffice in Paducah; and that he has known the plaintiff, Robert H. Peery, for about ten years; and that he worked with him for over a year; and that prior to the accident to recover damages for which this action was brought he was erect and straight as to back and shoulders; and that he has never heard him spoken of as "humpy"; and that he was not a stoop shouldered man.

JOHN W. WATTS.

(Jurat.)

Affidavit of Charles W. Boswell.

Charles W. Boswell being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he has known the plaintiff, Robert H. Peery, for about fifteen years; and that prior to the accident to recover damages for which this action was brought he was an erect and normal man in appearance; and that he has never heard him called or designated as "humpy."

C. W. BOSWELL.

(Jurat.)

Affidavit of Carrie Theobald.

Carrie Theobald being first duly sworn deposes and says she resides in Paducah, Kentucky; and that she has been well acquainted with Robert H. Peery, the plaintiff in the above entitled action, about eight years; and that previous to the accident to recover damages for which this action was brought he was an erect
424 and normal man in appearance; and that he was not at all stoop shouldered; and that she has never heard him called or designated by any such nick-name as "humpy."

CARRIE THEOBALD.

(Jurat.)

Affidavit of Simmie Peery.

Simmie Peery being first duly sworn deposes and says that she resides in Paducah, Kentucky; and that she is the mother of the above named Robert H. Peery; and that previous to the time he met with the accident, to recover damages for which this action was brought, he was an erect and normal man in appearance; that he was not in the least stoop shouldered; and that she has never heard him called by any such nick-name as "humpy."

SIMMIE PEERY.

(Jurat.)

Affidavit of Nannie Gilliam.

Nannie Gilliam being first duly sworn deposes and says she resides in Paducah, Kentucky; that she is, and has been, for seventeen years last past well acquainted with Robert H. Peery, the above mentioned plaintiff; and that previous to the year 1911 he was an erect and normal man as to appearance; and that he was not stoop shouldered; and that she has never heard him called or designated by any such nick-name as "humpy."

NANNIE GILLIAM.

(Jurat.)

425 *Affidavit of Jennie Tatty.*

Jennie Tatty being first duly sworn deposes and says that she resides in Paducah, Kentucky; and that for nine years she has been well acquainted with Robert H. Peery, the above named plaintiff; and that previous to the time he met with the accident, to recover damages for which this action was brought, he was an erect and normal man in appearance; and that she has never heard or known of him being called by any such nick-name as "humpy."

JENNIE TATTY.

(Jurat.)

Affidavit of Dessie Warford.

Dessie Warford being first duly sworn deposes and says, that she resides in Paducah, Kentucky; that she has been well acquainted with Robert H. Peery for the past thirty years, and that previous to 1911 he was an erect and normal man as to appearance; and that she has never heard of him being called by the nick-name of "humpy."

DESSIE WARFORD.

(Jurat.)

Affidavit of Nannie M. Gilliam.

Nannie M. Gilliam being first duly sworn deposes and says, that she has been well acquainted with Robert H. Peery for twelve years;
426 that prior to the accident, to recover damages for which the above entitled action was brought, he was an erect and normal man in appearance; and that she has never heard or known of him being called or designated by any nick-name such as "humpy."

NANNIE M. GILLIAM.

(Jurat.)

Affidavit of William R. Duke.

William R. Duke being first duly sworn deposes and says that he resides in Paducah, Kentucky; that he is, and for eleven years last past has been well acquainted with Robert H. Peery, the above named plaintiff, and that previous to the accident and injury to recover damages for which this action was brought, he was an erect man as to back and shoulders; and that he has never heard him called by any such nick-name as "humpy."

WILLIAM R. DUKE.

(Jurat.)

Affidavit of Earl N. Webb.

Earl N. Webb being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he has known the above named plaintiff for about seven years, and that prior to his injury in a railway accident in 1911 Mr. Peery was an erect and normal man in appearance, and not a stoop shouldered man. This affiant further says that he has never heard him called or designated by any such nick-name as "humpy."

EARL N. WEBB.

(Jurat.)

427 *Affidavit of Andrew S. Whitlock.*

Andrew S. Whitlock being first duly sworn deposes and says that he is a farmer, living about five miles from Paducah; and that he has known the plaintiff, Robert H. Peery, for over thirty years; and that before the accident to recover damages for which this action was brought, he was straight as to back and shoulders, and not a stoop shouldered man; and that he has never heard anyone call or designate him as "humpy."

ANDREW S. WHITLOCK.

(Jurat.)

Affidavit of Walter Gilliam.

Walter Gilliam being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he has been well acquainted with the above named plaintiff, Robert H. Peery, for about nineteen years, and that prior to the time he was injured in a railway accident in 1911, he was an erect and normal man in appearance, and that this affiant has never heard him called or designated by any such nick-names as "humpy."

WALTER GILLIAM.

(Jurat.)

Affidavit of Joseph W. Webb.

Joseph W. Webb being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he has known intimately Robert H. Peery, the plaintiff in the above entitled
428 action for nineteen years; and that previous to the accident to recover damages for which this action was brought he was an erect and normal man, not stoop shouldered; and that he has never heard him called or designated by any such nick-name as "humpy."

J. W. WEBB.

(Jurat.)

Affidavit of John W. Ivey.

John W. Ivey being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he has been well acquainted with Robert H. Peery, the plaintiff in the above entitled action; and that previous to the accident for which he is seeking to recover damages in the above entitled action he was an erect and normal man in appearance, and not in the least stoop shouldered; and that this affiant has never heard him called or designated by any such nick-name as "humpy."

JOHN W. IVEY.

(Jurat.)

Affidavit of Bertha McNeill.

Bertha McNeill being first duly sworn deposes and says that she resides in Paducah, Kentucky; that she has known Robert H. Peery, the above named plaintiff, for nine years; that previous to the time of his injury, for which the above entitled action was brought
429 to recover damages, he was an erect and normal man in appearance; and that he was not stoop shouldered; and that she has never heard him called by the nick-name of "humpy."

BERTHA McNEILL.

(Jurat.)

Affidavit of Martha E. Gilliam.

Martha E. Gilliam being first duly sworn deposes and says. That she lives in Paducah, Kentucky; that she has been well acquainted with the above named plaintiff, Robert H. Peery, for seventeen years; that previous to the time he met with the accident to recover damages for which the above entitled action was brought, he was an erect, normal man in appearance, and that he was not a stoop shouldered man; that she has never known him to be called or designated by any nick-name such as "humpy."

Mrs. MARTHA E. GILLIAM.

(Jurat.)

Affidavit of James R. Moore.

James R. Moore being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he is the manager and part owner of the Illinois Coal and Feed Co., doing business at 1514 Tennessee street, Paducah, Ky.; and that he has known Robert H. Peery, the plaintiff in the above entitled action for about nineteen years; and that previous to the accident to recover damages
430 for which this action was brought he was an erect and normal man in appearance; and that he was not stoop shouldered;

and that this affiant has never heard him called or designated by any such nick-name as "humpy."

JAS. R. MOORE.

(Jurat.)

Affidavit of William Cook.

William Cook being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he has been intimately acquainted with Robert H. Peery, the plaintiff in the above entitled action, for about twenty years; and that he went to school with said Robert H. Peery and has worked with him; and that previous to the accident to recover damages for which this action was brought he was an erect and normal man in appearance, and not at all stoop shouldered; and that he has never heard him called or designated by any such nick-name as "humpy."

WILLIAM COOK.

(Jurat.)

Affidavit of John H. Pryor.

John H. Pryor being first duly sworn deposes and says that he resides in Paducah, Kentucky; and that he has been well acquainted with Robert H. Peery for about thirty-five years; and that previous to the accident to recover damages for which this action was
431 brought he was an erect and normal man in appearance and not stoop shouldered; and that this affiant has never heard him called or designated by any such nick-name as "humpy."

JOHN H. PRYOR.

(Jurat.)

Affidavit of Mrs. Prudie Parrott.

Affiant, Mrs. Prudie Parrott, being first duly sworn, deposes and says that she resides in Folsomdale, Graves County, Kentucky; and that she has been well acquainted with the plaintiff, Robert H. Peery, for about sixteen years; that prior to his accident on the railroad in the year 1911, the said Peery was an erect and normal man and was not a stoop shouldered man; that this affiant has never at any time heard the said Peery called or termed "Humpy" by anyone.

Mrs. PRUDIE E. PARROTT.

(Jurat.)

Affidavit of Mrs. Fannie Torian.

Affiant, Mrs. Fannie Torian, being first duly sworn, deposes and says; that she resides in Melber, McCracken County, Kentucky; and that she is the wife of A. C. Torian; that she has been well acquainted with the plaintiff, Robert H. Peery, for about (14) fourteen years; and that prior to his accident in the year 1911, the said Peery was

an erect and normal man in appearance and not a stoop
432 shouldered man; that she has never heard said Peery called or designated by any such nick-name as "Humpy."

Mrs. FANNIE TORIAN.

(Jurat.)

Affidavit of Mrs. Lou Thomas.

Affiant, Mrs. Lou Thomas, being first duly sworn, deposes and says that she resides in Folsomdale, Graves County, Kentucky, and that she is the wife of Doctor M. E. Thomas, that she has been well acquainted with the plaintiff, Robert H. Peery, for about twenty-four years; that prior to his accident on the railroad in the year 1911 the said Peery was an erect and normal man, and was not a stoop shouldered man; that this affiant has never heard the said Peery called or designated by any such nick-name as "Humpy."

LOU THOMAS.

(Jurat.)

Affidavit of Mrs. Pearl Elliott.

The affiant, Mrs. Pearl Elliott, being first duly sworn, deposes and says that she resides in Folsomdale, Graves County, Kentucky; and that she is the wife of Henry L. Elliott; that she has been well acquainted with the plaintiff, Robert H. Peery for about twenty-four years; that prior to his accident in the year 1911 the said Peery was an erect and normal man and was not stoop shouldered; that
433 this affiant has never heard said Peery called or termed "Humpy."

Mrs. PEARL ELLIOTT.

(Jurat.)

Affidavit of Albert G. Chapman.

Albert G. Chapman, being first duly sworn, deposes and say; that he is well acquainted with the plaintiff, Robert H. Peery, and that said Robert H. Peery was raised within two miles of the home of this affiant; and that prior to the accident to recover damages for which this action is brought he, the said Peery, was an erect and normal man as to appearance; and that he was not a stoop shouldered man; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

ALBERT G. CHAPMAN.

(Jurat.)

Affidavit of Henry L. Elliott.

The affiant, Henry L. Elliott, being first duly sworn, deposes and says that he resides at Folsomdale, in Graves County, Kentucky; that he is engaged in the general merchandise business in said town; that he has been well acquainted with the plaintiff. Robert H. Peery,

for about eight years, and that prior to the year 1911 and his accident which occurred in a railway wreck, the said Peery was an erect
434 and normal man, and was not a stoop shouldered man; that this affiant has never heard said Peery called or termed by any such nick-name as "Humpy."

H. L. ELLIOTT.

(Jurat.)

Affidavit of William T. Fristoe.

Affiant, William T. Fristoe, being first duly sworn, deposes and says that he resides at Folsomdale, Graves County, Kentucky; that he has been well acquainted with the plaintiff, Robert H. Peery, for more than thirty years; that prior to his accident to recover damages for which this action was brought the said Peery was an erect and normal man and not a stoop shouldered man; and that he has never at any time heard said Peery called or termed by any such nick-name as "Humpy."

W. T. FRISTOE.

(Jurat.)

Affidavit of Mrs. Susan M. Fristoe.

Affiant, Mrs. Susan M. Fristoe, being first duly sworn, deposes and says that she is the wife of William T. Fristoe and that she lives at Folsomdale, Graves County, Kentucky; that she has been well acquainted with the plaintiff, Robert H. Peery, for more than twenty-four years; that prior to his accident to recover damages for which this action was brought said Peery was an erect and normal
435 man, and not a stoop shouldered man; and affiant says that she has never heard of said Peery being called or termed by any such nick-name as "Humpy."

SUSAN M. FRISTOE.

(Jurat.)

Affidavit of William Housman.

William Housman, being first duly sworn, deposes and says that he is a farmer living in Graves County, Kentucky; and that he has known the plaintiff, Robert H. Peery, for about twenty-five years; and that previous to the accident to recover damages for which this action was brought he was an erect and normal man in appearance, and that he was not a stoop shouldered man, and that he has never heard him called or designated by any such nick-name as "Humpy."

J. W. HOUSMAN.

(Jurat.)

Affidavit of William E. Beard.

William E. Beard, being first duly sworn, deposes and says that he resides at Boaz Station, Graves County, Kentucky; that he has

known the plaintiff, Robert H. Peery, ever since he, the said Peery, was a boy; that they were reared within four miles of each other; and that he has frequently been in swimming with him; and he was
436 prior to the accident to recover damages for which this action was brought, an erect and normal man in appearance; and that he was not a stoop shouldered man; and that he has never heard him called or designated as "Humpy."

WILLIAM E. BEARD.

(Jurat.)

Affidavit of George W. Vaughan.

George W. Vaughan, being first duly sworn, deposes and says; that he resides on a farm in Graves County, Kentucky, and that he has known the plaintiff, Robert H. Peery, for about 30 years; and that the said Robert H. Peery was reared within about (5) five miles of the home of this affiant; and that prior to the accident to recover damages for which his action was brought the said Robert H. Peery was erect as to stature and apparently a normal man; and that he was not a stoop shouldered man; and this affiant has never heard him called or designated by any such nick-name as "Humpy."

GEORGE W. VAUGHAN.

(Jurat.)

Affidavit of Aubrey C. Torian.

Affiant Aubrey C. Torian being first duly sworn deposes and says that he resides at Melber, McCracken County, Kentucky, and that he is engaged in the general merchandise business in said town of
437 Melber, and that he has intimately known the plaintiff, Robert H. Peery for more than twenty years; that he knows him to have been prior to the year 1911 an erect and normal man as to back and shoulders and that he was not a stoop or round shouldered man; and that he has never heard him called or designated by any such nickname as "Humpy."

AUBREY C. TORIAN.

(Jurat.)

Affidavit of S. B. Pryor.

Samuel B. Pryor being first duly sworn deposes and says that he has known the plaintiff, Robert H. Peery, for over thirty-five years; and that during all of that time he has been in a position to observe and notice the said Robert Peery; and that prior to the accident to recover damages for which this action was brought he was an erect and normal man as to appearance; and that he was not a stoop shouldered man, and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

S. B. PRYOR.

(Jurat.)

Affidavit of J. J. Mack.

John J. Mack being first duly sworn deposes and says: that he resides at Dog Wood, Graves County, Kentucky; and that he is engaged in the general merchandise business at said place and
438 that his postoffice address is Boaz, Graves County, Kentucky; and he says that he has known the plaintiff, Robert H. Peery, for the past sixteen years; and he has worked with him and had opportunity to observe his condition as to being erect or stoop shouldered, and that prior to the accident to recover damages for which this action is brought, the said Robert H. Peery was erect and normal in appearance; and that he was not a stoop shouldered man; and that this affiant has never heard him called by any such nick-name as "Humpy."

J. J. MACK.

(Jurat.)

Affidavit of H. G. Park.

Howard G. Park, being first duly sworn, deposes and says, that he resides in Paducah, McCracken County, Kentucky; and that he has known the plaintiff, Robert H. Peery, for about two years before the accident to recover damages for which this action was brought; and that he was an erect and normal man as to appearance; and that he was not a stoop shouldered man; and that he has never heard him called or designated by any such nick-name as "Humpy."

H. G. PARK.

(Jurat.)

Affidavit of Tilden J. Sanderson.

Tilden J. Sanderson first being duly sworn deposes and says
439 that he resides in Paducah, Kentucky; and that he is well acquainted with the plaintiff, Robert Peery, having known him for fifteen years; and that prior to the year 1911, he was an erect and normal man in appearance and was not stoop shouldered; and that he has never heard him called or designated by the nick-name, "Humpy."

TILDEN J. SANDERSON.

(Jurat.)

Affidavit of John W. Fry.

Affiant John W. Fry, being first duly sworn, deposes and says; that he resides at Melber, McCracken County, Kentucky, and that he owns and operates a flour mill in that town and that he has been well acquainted with the plaintiff, Robert H. Peery, for about twenty-five years; and that prior to the year 1911 the said Robert H. Peery was an erect and normal man in appearance and not a stoop shoul-

dered man and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

JOHN W. FRY.

(Jurat.)

Affidavit of John W. Ford.

Affiant, John W. Ford, being first duly sworn deposes and says; that he resides at Paducah, Kentucky; and that he is a brother of Ford and English of that city and in the employ of the latter; and that he has known the plaintiff, Robert H. Peery, for about
440 twenty-five years; and that prior to 1911 the said Robert H. Peery was an erect and normal man in appearance; and that he was not a stooped shouldered man; and that this affiant has never heard him called or designated by the nick-name of "Humpy."

JOHN W. FORD.

(Jurat.)

Affidavit of Tolbert E. Ford.

Tolbert E. Ford, being first duly sworn deposes and says; that he resides at Paducah, Kentucky, and that he is the owner and manager of a wholesale grocery house in said city; and that he is a member of the Board of Public Works in said city; and that he has known the plaintiff, Robert H. Peery, for about twenty years; and that prior to the last year or two, the said Robert H. Peery was an erect and normal man in appearance; and that he was not a stoop shouldered man; and this affiant says he has never heard him called or designated by any such nick-name as "Humpy."

TOLBERT E. FORD.

(Jurat.)

Affidavit of Chas. B. Whittemore.

Affiant, Chas. B. Whittemore, being first duly sworn deposes and says; that he is a resident citizen of the City of Paducah, Kentucky; that he is County jailer for McCracken County, Kentucky;
441 and that he has been well acquainted with the plaintiff, Robert H. Peery, for the past twenty-five years; and that prior to the accident to recover damages for which this action was brought, the said Robert H. Peery was an erect and normal man in appearance; that he was not stooped and round shouldered; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

CHAS. B. WHITTEMORE.

(Jurat.)

Affidavit of W. J. Cunningham.

Affiant, William J. Cunningham, first being duly sworn deposes and says; that he resides on a farm in McCracken County, Kentucky; and that he has been well acquainted with the plaintiff, Robert

H. Peery for more than twenty years; and that prior to the accident to recover damages for which this action was brought he was an erect and normal man; and that he was not a stoop shouldered man; and that he has never heard him called or designated as "Humpy."

W. J. CUNNINGHAM.

(Jurat.)

Affidavit of John P. Riley.

Affiant John P. Riley, first being duly sworn, deposes and says: that he resides in the City of Murray in the County of Cal-
442 loway, Kentucky; that he is pastor of three Baptist Churches in Calloway County; and that prior to the year of 1911 said Robert H. Peery was an erect and normal man in appearance and not a stoop shouldered man; and that this affiant has never heard him called or designated by any such nick-name as "Humpy"; that he has been well acquainted with said Peery for the past twelve years.

JOHN P. RILEY.

(Jurat.)

Affidavit of Hezekiah K. Thomas.

Affiant, Hez-kiah K. Thomas, being first duly sworn deposes and says: that he resides in Paducah, Kentucky; and that he is pastor of the East Baptist Church of that City; and that he has been well acquainted with the plaintiff, Robert H. Peery, since childhood; and that prior to 1911 said Robert H. Peery was an erect and normal man in appearance; and that he was not a stoop shouldered man; this affiant further says that he has never heard said Robert H. Peery called or designated by any such nick-name as "Humpy."

HEZEKIAH K. THOMAS.

(Jurat.)

Affidavit of Clifton D. Gilliam.

Clifton D. Gilliam first being duly sworn deposes and says; that he is a resident of Paducah, Kentucky, and a member of the police force of that city; that he has known the plaintiff, Robert H. Peery, for about 19 years; and that previous to the accident
443 to recover damages for which this action was brought he was an erect and normal man in appearance; that he was not a stoop shouldered man, and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

CLIFTON D. GILLIAM.

(Jurat.)

Affidavit of William R. Huddleston.

Affiant William R. Huddleston being first duly sworn deposes and says that he resides in Melber, McCracken County, Kentucky, and

owns and manages a broom factory in said town of Melber; that he has been well acquainted with plaintiff, Robert H. Peery, for more than twenty-five years; that prior to the accident to recover damages for which this action was brought, the said Robert Peery was an erect and normal man in appearance, and that he was not stoop shouldered; that this affiant has never at any time heard said Peery called or termed by any such nick-name as "Humpy" by his neighbors and acquaintances.

WILLIAM R. HUDDLESTON.

(Jurat.)

Affidavit of Ira G. Otey.

Affiant, Dr. Ira G. Otey, being first duly sworn deposes and says; that he is a practicing physician and surgeon duly authorized
444 to practice medicine under the laws of Kentucky, and that he has been practicing his profession for ten years; and that he is well acquainted with the plaintiff, Robert H. Peery, and that he has been so acquainted with him for at least twenty-five years; and that prior to the accident to recover damages for which this action was brought the said Robert H. Peery was an erect and normal man in appearance and was not a stoop shouldered man; and that he has never heard of said Peery being called or termed by his neighbors and acquaintances as "Humpy."

IRA G. OTEY, *M. D.*

(Jurat.)

Affidavit of John F. Jones.

Affiant, John F. Jones, being first duly sworn deposes and says: that he resides at Paducah, Ky., and that he has been well acquainted with the plaintiff, Robert H. Peery, for about twenty years; and that previous to the accident to recover damages for which this action was brought he, the said Robert H. Peery was an erect and normal man in appearance; and that he was not a stoop shouldered man; and that this affiant has never heard him called or termed by any such nick-name as "Humpy."

JOHN F. JONES.

(Jurat.)

445 *Affidavit of Oliver D. Allcock.*

Affiant, Oliver D. Allcock, being first duly sworn deposes and says; that he resides on his own farm one mile west of Melber in Graves County; that he has been well acquainted with the plaintiff, Robert Peery, for more than thirty years, and that prior to his accident to recover damages for which this action was brought he was an erect and normal man and not stoop shouldered, and that this affiant has never heard him called or termed by any such nick-name as "Humpy."

OLIVER D. ALLCOCK.

(Jurat.)

Affidavit of Jack R. Whittemore.

Affiant Jack R. Whittemore, being first duly sworn deposes and says that he resides at Melber, McCracken County, Kentucky, and that he is forty-two years of age; that he is well acquainted with the plaintiff, Robert H. Peery, having known him since the said Peery and this affiant were boys in school together; that prior to the year 1911 the said Peery was an erect and normal man in appearance; that he was not a stoop shouldered man; nor did this affiant ever at any time hear said Peery called or termed by any such nick-name of "Humpy."

JACK R. WHITTEMORE.

(Jurat.)

446 *Affidavit of Charles A. Wyatt.*

Affiant, Charles A. Wyatt, being first duly sworn deposes and says; that he resides in Graves County, Kentucky, about two miles southeast of Melber, Kentucky; that he owns the farm he lives on; and that he has been well acquainted with the plaintiff, Robert H. Peery, for more than twenty years and that previous to accident to recover damages for which this action was brought this affiant knows that said Peery was an erect and normal man in appearance and that he was not a stoop shouldered or round shouldered man; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

CHARLES A. WYATT.

(Jurat.)

Affidavit of Joseph P. Ford.

Affiant, Joseph P. Ford, being first duly sworn deposes and says, that he resides in the City of Paducah, Kentucky; and that during the years of 1912 and 1913 he was a member of the City Council of said city and that now — is a member of the firm of Ford & Englert, wholesale grocers, doing business in the City of Paducah; and that for the past twelve years he has been well acquainted with the plaintiff, Robert H. Peery; that prior to the accident to recover damages for which this action was brought said Robert H. Peery was an erect and normal man in appearance; and that he
447 was not a stoop shouldered man; and that he has never heard of him being called or designated by the term or nick-name of "Humpy."

JOSEPH P. FORD.

(Jurat.)

Affidavit of James T. Thompson.

Affiant, James T. Thompson, being first duly sworn deposes and says; that he is a farmer residing on his own farm situated one and

one-half miles north of Folsomdale in Graves County, Kentucky; that he has known the plaintiff, Robert H. Peery intimately for more than twenty-four years; that part of that time said Peery worked with this affiant; that prior to the accident to recover damages for which this action was brought, said Peery was erect and straight as to back and shoulders; that he was not a stoop shouldered man; and that he has never heard him called or designated by any such nick-name as "Humpy."

JAMES T. THOMPSON.

(Jurat.)

Affidavit of Wiley Hall.

Affiant Wiley Hall being first duly sworn deposes and says; that he resides on his own farm near Melber, and that he has been well acquainted with the plaintiff, Robert H. Peery for more than thirty years; and that prior to the accident to recover damages for
448 which this action was brought he was an erect and normal man in appearance; and not a stoop shouldered man, and this affiant has never heard him called or designated as "Humpy."

WILEY HALL.

(Jurat.)

Affidavit of Bedfor Otey.

Affiant Bedfor Otey being first duly sworn deposes and says; that he resides on his own farm near Melber, Graves County, Kentucky; and that he has been well acquainted with the plaintiff, Robert H. Peery, all of his, the said Peery's life-time; that prior to his accident to recover damages for which this action was brought he was an erect and normal man in appearance and not stoop shouldered; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

B. OTEY,
Per IRA G. OTEY, *M. D.*

(Jurat.)

Affidavit of John L. Quisenberry.

John L. Quisenberry being first duly sworn deposes and says; that he resides in McCracken County on his own farm near Paducah, Kentucky; that he has known the plaintiff, Robert H. Peery intimately all of his life, and that prior to the accident to recover damages for which this action was brought, the said
449 Robert H. Peery was an erect and normal man and not stoop shouldered; and that he has never heard of the said Peery being call-d or termed by any such nick-name as "Humpy."

JOHN L. QUISENBERRY.

(Jurat.)

Affidavit of George L. Beasley.

George L. Beasley, being first duly sworn deposes and says; that he is a resident of the city of Paducah, Kentucky, and that he is now engaged in the grocery business on Tennessee street, in said city; and that he has known the plaintiff, Robert H. Peery, for about eight years; and that prior to the year 1911 when Robert H. Peery was injured in a railway accident, that he was straight as to back and shoulders and a normal appearing man, and not a stoop shouldered man; and that he has never heard him called or designated by any such nick-name as "Humpy."

GEORGE L. BEASLEY.

(Jurat.)

Affidavit of Dr. Quintus L. Shelton.

Affiant, Dr. Quintus L. Shelton, being first duly sworn deposes and says; that he is physician and surgeon, duly licensed to practice his profession in the State of Kentucky, and that he has been so practicing for twenty-four years in said state and that he
450 resides and is now practicing at Lone Oak in McCracken County, Kentucky; and that he has been well acquainted with the plaintiff, Robert H. Peery, for about 17 years; and that for about five he was the family physician of said Robert H. Peery; and that previous to the accident to recover damages for which this action was brought he was an erect and normal man in appearance; and that he was not a stoop shouldered man; that this affiant has never heard him called or designated by any such nick-name as "Humpy."

QUINTUS L. SHELTON.

(Jurat.)

Affidavit of Quintus H. Jones.

Affiant Quintus H. Jones, being first duly sworn deposes and says, that he resides on his own farm at Melber, Graves County, Kentucky; and that he has been well acquainted with the plaintiff, Robert H. Peery, for about twenty years; and that prior to his accident in the year 1911 to recover damages, for which this action was brought, he was an erect and normal man in appearance; and that he was not stooped or round shouldered; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

Q. H. JONES.

(Jurat.)

Affidavit of J. Wallace Coleman.

J. Wallace Coleman, being first duly sworn deposes and
451 says; that he resides at Paducah, Kentucky, and that he is a druggist by profession, and that he is now and has been for

twenty years well acquainted with Robert H. Peery, the above named plaintiff, and that prior to the time that he met with the accident to recover damages for which this action was brought he was a normal man and was not stoop shouldered and that he never heard him called or designated by any such nick-name as "Humpy."

J. WALLACE COLEMAN.

(Jurat.)

Affidavit of Lance Dossett.

Affiant, Lance Dossett, being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he is one of the members of the grocery firm of Watkins & Dossett, doing business on Tennessee street, in Paducah, Kentucky; and that he has been well acquainted with the plaintiff, Robert Peery, for more than twenty-five years; that he was in fact reared with the said Robert H. Peery; and that this affiant knows of his own knowledge that said Robert H. Peery was erect and straight as to back and shoulders previous to the accident to recover damages for which this action was brought; and that he was not a stoop shouldered and round shouldered man; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

LANCE DOSSETT.

(Jurat.)

452 *Affidavit of Mrs. Ida Cornillaud.*

Affiant, Mrs. Ida Cornillaud being first duly sworn deposes and says, that she resides at Paducah, Kentucky, and that she owns and operates a grocery store on Mayfield road in the City of Paducah, Kentucky; that she has been well acquainted with the plaintiff, Robert H. Peery, for about ten years; and that before his accident in the year of 1911 to recover damages for which this action was brought he was an erect and normal man as to appearance; and not stoop shouldered; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

MRS. IDA CORNILLAUD.

(Jurat.)

Affidavit of Dr. Elmer E. Davis.

Affiant Doctor Elmer E. Davis being first duly sworn deposes and says; that he is physician and surgeon duly licensed to practice his profession in Kentucky, and that he resides near Melber, in McCracken County, Kentucky; that on or about March 13th, 1914, this affiant was approached by one Merritt Seay, who asked this affiant to make an affidavit to the effect that the plaintiff, Robert H. Peery, was a stoop shouldered man prior to his accident in the year 1911 and that he was known in the community where he lived as "Humpy," that he was narrow chested and slow walking

453 man; and that the said Merritt Seay stated that he was a claim agent for the Illinois Central Railroad Company, and said Seay further told this affiant that he, the said Merritt Seay would make it this affiant's interest to make such an affidavit; and that this affiant then told Merritt Seay that he could not make any such affidavit; that he had attended school with said Peery and had known him intimately and up until the said Peery moved to Paducah, and that he considered said Peery one of the strongest and most athletic young men in the County, and that he was erect and normal in appearance, much more erect than the average man; that he never heard him called "Humpy." 6

E. E. DAVIS, *M. D.*

(Jurat.)

Affidavit of William C. Totty.

Affiant, William C. Totty, being first duly sworn deposes and says; that he resides at the City of Paducah, Kentucky; that he has been well acquainted with the plaintiff, Robert H. Peery, for about ten years; and that previous to the accident to recover damages for which this action was brought, the said Robert H. Peery was an erect and normal man; and that he was not stoop shouldered; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

WILLIAM C. TOTTY.

(Jurat.)

454 *Affidavit of Pearl Dossett.*

Affiant, Pearl Dossett, being first duly sworn deposes and says; that she resides in the City of Paducah, Kentucky, and that she has known the plaintiff, Robert H. Peery, for about fifteen years; and that previous to the accident to recover damages for which this action was brought he was an erect and normal man in appearance, and that he was not stoop shouldered; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

PEARL DOSSETT.

(Jurat.)

Affidavit of William M. Moore.

Affiant, William M. Moore, being first duly sworn deposes and says; that he resides at Paducah, Kentucky; and that he is a member of City Council of the said City of Paducah, Kentucky; and that he has been well acquainted with the plaintiff, Robert H. Peery, for more than ten years; and that previous to the accident to recover damages for which this action was brought, the said Robert H. Peery was an erect and normal man in appearance; and that he was not a stoop shouldered man; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

WILLIAM M. MOORE.

(Jurat.)

455 *Affidavit of William A. Bethel.*

Affiant, William A. Bethel, being first duly sworn deposes and says, that he resides at Paducah, Kentucky; and that he has been well acquainted with plaintiff, Robert H. Peery, for about eight years; that previous to the accident to recover damages for which this action was brought, the said Robert H. Peery was an erect and normal man; that he was not a stoop shouldered man; and that he has never at any time heard the said Peery called, or that he was known by any such nick-name as "Humpy."

his
WILLIAM x A. BETHEL.
mark.

(Jurat.)

Affidavit of James T. Watkins.

Affiant, James T. Watkins, being first duly sworn deposes and says; that he resides at Paducah, Kentucky; that he is one of the members of firm of Watkins & Dossett, groceries, doing business in the city of Paducah, Kentucky; and that he has been well acquainted with the plaintiff, Robert H. Peery, ever since he was born; and that previous to the accident to recover damages for which this action was brought he was an erect and normal man in appearance; and that he was not a stoop shouldered or round shouldered man; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

J. T. WATKINS.

(Jurat.)

456 *Affidavit of Mollie Carney.*

Affiant Mollie Carney being first duly sworn deposes and says that she resides in the City of Paducah, Kentucky; that she has been well acquainted with the plaintiff, Robert H. Peery, for about fifteen years, and that before his accident on the railroad in the year 1911 he was erect and straight as to back and shoulders and not a stoop shouldered man; and that she has never heard him called or designated by any such nick-name as "Humpy."

MOLLIE CARNEY.

(Jurat.)

Affidavit of Howard Stewart.

Affiant, Howard Stewart, being first duly sworn deposes and says, that he resides at Paducah, Kentucky; that he has been well acquainted with the plaintiff, Robert H. Peery, for about ten years; and that said Robert H. Peery was prior to his accident on the railroad in the year 1911 an erect and normal man in appearance; and that he was not a stoop shouldered man; and that this affiant has

never heard him called or designated by any such nick-name as "Humpy."

(Jurat.) HOWARD STEWART.

Affidavit of Horace Stewart.

Affiant, Horace Stewart, being first duly sworn deposes and says that he resides at Paducah, Kentucky; and that he has been
457 well acquainted with the plaintiff, Robert H. Peery, for about ten years; and that previous to the accident to recover damages for which this action was brought he was an erect and normal man in appearance; and not a stoop shouldered man; and that he has never heard him called or designated by any such nick-name as "Humpy."

(Jurat.) HORACE STEWART.

Affidavit of Dr. Martin E. Thomas.

Affiant, Dr. Martin E. Thomas, being first duly sworn deposes and says that he resides in Folsomdale, Kentucky; that he is a practicing physician and surgeon duly licensed to practice his profession under the laws of Kentucky; and that he has been practicing in said vicinity for the last sixteen years, and that he has been well acquainted with plaintiff, Robert H. Peery, all of said Peery's life; and that this affiant was for some years the family physician for said Peery; and that this affiant knows said Robert H. Peery was an erect and normal man as to back and shoulders; not stoop shouldered, or deformed in any way; that this affiant has had occasion to examine him previous to the year 1911 on several occasions and it is with reference to the time previous to the year 1911 that this affiant is testifying; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

(Jurat.) MARTIN E. THOMAS, M. D.

458 *Affidavit of William H. Lawson.*

Affiant, William H. Lawson, being first duly sworn deposes and says: that he resides in Melber, McCracken County, Kentucky, and that he owns and operates a saw mill near that place; that he has known the plaintiff, Robert H. Peery, for more than twenty-five years; and that previous to the year 1911, said Peery was an erect and normal man in appearance and not a stoop shouldered man; and that he has never heard said Peery called or designated by any such nick-name as "Humpy."

(Jurat.) WILLIAM H. LAWSON.

Affidavit of John W. Morris.

Affiant John W. Morris being first duly sworn deposes and says that he resides in Melber, McCracken County, Kentucky; and that he has been well acquainted with the plaintiff, Robert H. Peery, for more than twenty years; and that previous to his accident in the year 1911 to recover damages for which this action was brought, the said Peery was an erect and normal man in appearance, and not stoop shouldered; and that he has never heard him called or designated by any such nick-name as "Humpy."

J. W. MORRIS.

(Jurat.)

459 *Affidavit of William S. Hickman.*

Affiant, William S. Hickman, being first duly sworn deposes and says; that he resides on his own farm on the County Line Road, in Graves County, about four miles from Melber; that he has been well acquainted with the plaintiff, Robert H. Peery, for about thirty years; that prior to his accident in the year 1911, the said Peery was an erect and normal man, and was not stooped shouldered; that this affiant has never heard him called or designated by any such nick-name as "Humpy."

WILLIAM S. HICKMAN.

(Jurat.)

Affidavit of Richard G. Page.

Affiant, Richard G. Page, being first duly sworn deposes and says: That he resides on his own farm in Graves County, Kentucky, and that he has been well acquainted with the plaintiff, Robert H. Peery, for more than twenty-five years, and that prior to his accident in the year of 1911 to recover damages for which this action was brought, the said Peery was an erect and normal man and not stooped shouldered, and that he has never heard him called by any such nick-name or term as "Humpy."

RICHARD G. PAGE,
By W. S. HICKMAN.

(Jurat.)

460 *Affidavit of P. N. Jones.*

Affiant P. N. Jones being first duly sworn deposes and says: That he resides on his own farm in Graves County, Kentucky; that he has been acquainted with the plaintiff, Robert H. Peery, for about fourteen years; and that in appearance the said Peery was an average man as to erectness and straightness of back; and that he has never heard him called by any such nick-name as "Humpy."

P. N. JONES.

(Jurat.)

Affidavit of Le Roy Titsworth.

Le Roy Titsworth being first duly sworn deposes and says: That he resides on his own farm near Melber, Kentucky; that he has been intimately acquainted with plaintiff, Robert H. Peery, for over thirty years; and that before his accident on the railroad in the year 1911, the said Peery was an erect and normal appearing man, and not a stoop shouldered man; affiant further states that he has never heard said Peery called or designated by any such nick-name as "Humpy."

LE ROY TITSWORTH.

(Jurat.)

Affidavit of Mrs. Eunice Thompson.

Affiant, Mrs. Eunice Thompson, being first duly sworn deposes and says: That she has been well acquainted with the plaintiff, Robert H. Peery, for more than twenty years; and that be-
461 fore his accident on the railroad in the year 1911, he was an erect and normal man in appearance, and not a stoop shouldered man, and that she has never heard him called or designated by any such nick-name as "Humpy."

MRS. EUNICE THOMPSON.

(Jurat.)

Affidavit of Arcian E. Parrot.

Affiant, Arcian E. Parrot being first duly sworn deposes and says: That he resides in Folsomdale, Graves County, Kentucky; that he is a blacksmith by trade, owning and operating his own business in Folsomdale; and that he has been well acquainted with plaintiff, Robert H. Peery, for about twenty years; and that prior to year 1911 said Peery was an erect and normal man in appearance and that this affiant considers that said Peery was unusually straight as to back and shoulders, and that he was an unusually strong and healthy man; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

A. E. PARROTT.

(Jurat.)

Affidavit of William Record.

Affiant William Record being first duly sworn deposes and says: That he resides on his own farm near Melber, Graves County, Kentucky; that he has been intimately acquainted with the
462 plaintiff, Robert H. Peery, for more than thirty years, in fact has known him since the said Peery was an infant; and that prior to his accident in the year 1911, which he received in a railway wreck, the said Peery was an erect and normal man in appearance, and was not stooped shouldered; that this affiant has

never heard said Peery called or designated by any such nick-name as "Humpy."

his
WILLIAM X RECORD.
mark.

Witness his mark:
C. A. WICKOFF.
Witness his mark:
A. E. PARROTT.

(Jurat.)

Affidavit of Robert H. Peery.

Robert H. Peery, being first duly sworn deposes and says: That he has read the sixty-six affidavits of various persons attached to the moving papers of the defendant in the above entitled action, wherein the defendant asks for a new trial; that he has read and noticed in many of said affidavits the statement that he, this affiant, was known in the community where said respective affiants live, by the nick-name of "Humpy," and that such affidavits and each and every one in that respect is false; that this affiant was never known or designated by any such term or any term indicating or intimating that he, this affiant, was stoop shouldered or bent over, or was in other than normal position as to physique.

463 This affiant further states that he is acquainted with W. G. McFadden, the photographer whose affidavit is attached to this affidavit and that his photograph was taken by said McFadden at the time specifiedd in his affidavit and that the photograph thereto attached is a picture of this affiant, and that at the time said photograph was taken this affiant normally and regularly carried himself in the position physically as shown and set forth in said photograph.

This affiant further says that on the 29th day of April, 1914, that he in company with John B. Hall of Paducah, Kentucky, called on one Charles Aton at Melber, Kentucky, said Charles Aton being one of the persons who signed an affidavit for the defendant, which affidavit is one of those filed in the moving papers asking for a new trial in the above entitled action, and that said John B. Hall asked the said Charles Aton in my presence if he, the said Aton, knew that man, pointing to this affiant, and said Charles Aton looked at this affiant for two or three minutes and then replied: "No, I don't think I ever seen him before in my life."

ROBT. H. PEERY.

(Jurat.)

Affidavit of Thomas N. Hazelip.

Affiant, Thomas N. Hazelip, being first duly sworn deposes and says: That he is a citizen of the City of Paducah and that he is now holding the official position of Mayor of said city, and that he is

a practicing attorney-at-law; affiant further says that he is
464 acquainted with the general reputation of the following named persons, who are citizens of the City of Paducah, namely:

Samuel B. Pryor, Tolbert E. Ford, John W. Ford, Hezekiah K. Thomas, Charles B. Whittemore, Joseph P. Ford, John F. Jones, William Bethel, William M. Moore, John B. Hall, Charles H. Angle, Joseph Franks, F. A. Rankin, Cleve Gilliam, James N. Moore, Thomas H. Torian, Walter Gilliam and William P. Duke, and that they are all citizens of good repute, and that they are entitled to the highest respect and belief when sworn as witnesses.

THOS. N. HAZELIP.

(Jurat.)

Affidavit of John B. Hall.

Affiant, John B. Hall, being first duly sworn deposes and says; that he resides in the City of Paducah, Kentucky, and that on the 29th day of April, 1914, he went to Melber, McCracken County, Kentucky, in company with the plaintiff, Robert H. Peery, and that said Peery and this affiant went to see one Charles Aton, who resides at said town of Melber, in McCracken County, and who is the Charles Aton who signed an affidavit, which is one of the affidavits presented by this defendant in the moving papers in their motion for a new trial; this affiant pointed to Robert H. Peery and asked said Charles Aton if he knew him, the said Robert H. Peery, and
465 that said Charles Aton looked at said Peery for two or three minutes and then replied: No, I don't think I ever seen him before in my life."

JOHN B. HALL.

(Jurat.)

Affidavit of Clyde C. Rust.

Affiant Clyde C. Rust being first duly sworn deposes and says that he resides on the County Line Road, in Graves County, one and one-half miles from Melber, Ky., that on or about the 2nd day of April, 1914, one Merritt Seay induced this affiant to sign a statement in writing purporting to describe the physical condition of Robert H. Peery prior to the year 1911; on this 29th day of April, 1914 affiant's attention was called to the following affidavit:

"The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that before he was alleged to have been injured in a wreck on the Illinois Central in 1911, that Peery was a badly stooped man with his head extending forward and was not to be called an erect man at any time."

This affiant states that he did not in the statement which he signed on April the 2nd, 1914, make the following statements: "That Peery was a badly stooped man," or "that he was not to be called an erect man at any time," and that this affiant has not seen

the plaintiff, Robert H. Peery for the past eight years and
466 that all this affiant told Merritt Seay or that he thought was in said statement was "that Peery was slightly round shouldered to the best of his recollection"; that this affiant further states that he has never heard him called or designated "Humpy."

CLYDE C. RUST.

(Jurat.)

Affidavit of R. D. Thompson.

Affiant R. D. Thompson being first duly sworn deposes and says that he is the same R. D. Thompson, who on the 6th day of April, 1914, at the solicitation of one Merritt Seay signed an affidavit purporting to describe the physical condition of the plaintiff, Robert Peery; and that this affiant has on this the 1st day of May, 1914, been shown the following affidavit which purports to be the contents of the affidavit which he signed on said 6th day of April, 1914, which affidavit is in words as follows:

"The affiant states that he resided in the same community with Robert H. Peery before he entered the service of the railroad, and that Peery was always badly stooped with his head forward, and walked slow and was known to his neighbors and friends as "Humpy."

This affiant now says that he did not intend to say and in fact did not say the following: "That Peery was always badly stooped with his head forward, and walked slow and was known to his neighbors and friends as Humpy" as set forth in the above state-
467 ment, but on the contrary this affiant says that he has never heard said Peery called or designated by any such nickname as "Humpy," and all that he intended to say and in fact all that he did say was, that said Peery was a little round shouldered.

R. D. THOMPSON.

(Jurat.)

Affidavit of G. F. Garnett.

Affiant, G. F. Garnett, being first duly sworn deposes and says that he is the same G. F. Garnett who on the 2nd day of April, 1914, at the solicitation of one Merritt Seay signed an affidavit purporting to describe the physical condition of the plaintiff, Robert H. Peery; this affiant now states that he has on this the 1st of May, 1914, been shown an affidavit which purports to be the one he signed on said date, which affidavit is in words as follows:

"The affiant states that he is and has been personally acquainted with Robert H. Peery, plaintiff, for several years, and that he was a stooped shouldered man for years before he entered the service of the railroad, and that he resided in the same community before Peery entered the railroad service and that Peery's movements were always slow with his head forward."

This affiant now says that he was not personally acquainted with

plaintiff, Peery, but knew who he was and knew of him when
468 the said Peery was constable of Graves County, and this affiant did not intend to state, and in fact did not state in his said affidavit that said Peery was stooped shouldered; and this affiant says that he told Merritt Seay that this affiant just knew of said Peery, but did not know him personally; this affiant further states that he has never heard him called or designated by any such nickname as "Humpy."

G. F. GARNETT.

(Jurat.)

Affidavit of R. H. Goode.

Affiant, R. H. Goode, being first duly sworn deposes and says that he is the same R. H. Goode, who on the 2nd day of April, 1914, at the solicitation of one Merritt Seay signed an affidavit purporting to give this affiant's knowledge of the physical condition the plaintiff, Robert H. Peery; that this affiant has on this the 1st day of May, 1914, been shown the following affidavit which purports to be the one he signed on the 2nd day of April, 1914, which is in words as follows:

"The affiant states that he resided in the same community with Robert H. Peery, for several years before he entered the service of the Illinois Central, and that Peery was always considered and in fact was badly stooped, with his head extending forward and was termed Humpy by a great many people in that vicinity."

This affiant now states that he never intended to say, and in fact did not say, that said Peery was "badly stooped with his
469 head extending forward and was termed Humpy by a great many people in that vicinity," but on the contrary has never heard said Robert H. Peery called or designated by any such nickname as "Humpy."

R. H. GOODE.

(Jurat.)

Affidavit of Sylvester D. Ward.

Affiant, Sylvester D. Ward, being first duly sworn says that he is the S. D. Ward, who on the 6th day of April, 1914, at the solicitation of one Merritt Seay signed an affidavit concerning the physical condition of plaintiff, Robert H. Peery, and that this affiant has this the 1st day of May been shown the following affidavit purporting to be the one which he signed on the 6th day of April, 1914, reading as follows:

"The affiant states that he was personally acquainted with Robert H. Peery for several years before he began working for the railroad and that he was always a badly stooped man with his head forward, and was not erect and his movements were very slow at all times, and in the community in which he lived before working for the railroad, he was called Humpy on account of his stooped condition."

This affiant further says that the above affidavit is not correct in

this: that this affiant is not personally acquainted with said Robert H. Peery and so far as this affiant knows he has never met the
470 said Robert H. Peery, and that anything that he may have said in the affidavit which he gave to said Merritt Seay on the 6th day of April, 1914, was merely things which he had heard other people say.

S. D. WARD.

(Jurat.)

Affidavit of Linzia S. Staten.

Affiant, Linzia S. Staten, being first duly sworn deposes and says; that he resides in Melber, McCracken County, Kentucky; and that on or about the 3rd day of April, 1914, he was approached by one Merritt Seay and asked to sign an affidavit with reference to the condition of Robert H. Peery, plaintiff in the above entitled action; and that he did sign what purported to be a statement of the said Robert H. Peery's condition as he remembered it; and that this affiant has this the 29th day of April, 1914, been shown the affidavit which he signed at that time, April 3rd, 1914, and this affiant states now that he did not at that time intend to say at that time that said Robert H. Peery "was always badly stooped" and that this affiant did not intend to say that said Robert H. Peery "was known to his neighbors and friends as Humpy"; and that this affiant was never intimately acquainted with said Robert H. Peery, but that he would see him occasionally; and that prior to the making of this affidavit on April 3rd, 1914, that this affiant had not seen said Robert H. Peery for over six years.

LINZIA S. STATEN.

(Jurat.)

471 *Affidavit of Fred E. Bement.*

Affiant, Fred E. Bement, being first duly sworn deposes and says; that he resides on the County Line Road about two miles west of Melber, Kentucky, on his own farm; and that on or about the 7th day of April, 1914, at the solicitation of one Merritt Seay he signed an affidavit, giving his recollection on the physical appearance of plaintiff, Robert H. Peery, as he remembered it, and that this 30th day of April has been shown an affidavit bearing his name purporting to be the one signed by him on April 7th, 1914 as follows:

"The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that before he was alleged to have been injured in a wreck on the Illinois Central in 1911, that Peery was a badly stooped man with his head extending forward and not to be called an erect man at any time."

This affiant further states that said Merritt Seay had with him and showed to this affiant several, three or four typewritten forms of affidavits, and this affiant stated that he could not sign any of them as they were, but that he did sign the above affidavit, but that he instructed said Merritt Seay to strike out the word "badly" which appears in the fourth line of the above affidavit; this affiant further

states that in making the above affidavit that all he intended to say was that said Peery was just a little round shouldered, that this affiant has never heard said Peery called "Humpy" by any one.

FRED E. BEMENT.

(Jurat.)

472 *Affidavit of Emmit Huddleston.*

Affiant, Emmit Huddleston, being first duly sworn deposes and says; that he resides in Melber, McCracken County, Kentucky; and that on or about March 12th, 1914, he was approached by one Merritt Seay, who represented himself to be a claim agent of the Illinois Central Railroad Company, and who induced this affiant to sign a statement with reference to the condition of the plaintiff, Robert H. Peery; that this affiant has this day been shown an affidavit purporting to have been signed by him on the 12th day of March, 1914, as follows: "The affiant makes oath that he has been personally acquainted with Robert H. Peery for several years before Peery went to work for the railroad, and that Peery was round shouldered, short necked, with head forward and never was an erect man, and was always slow in his movements, signed—Emmit Huddleston." This affiant further says that the above is not the affiadvit which he signed, and that this affiant was not sufficiently well acquainted with said Peery to say whether he was an erect man or not or whether he was slow in his movements or not.

EMMIT HUDDLESTON.

(Jurat.)

Affidavit of Leonard J. Rust.

Affiant, Leonard J. Rust, being first duly sworn deposes and says that he resides about two and one-half miles from Melber, Kentucky, on the County Line Road; that he is the same L. J. Rust who
473 on the 2nd day of April, 1914, signed a statement at the solicitation of one Merritt Seay purporting to be a statement of the physical condition of the plaintiff, Robert H. Peery, and he has on this 29th day of April, 1914, been shown the following affidavit, purporting to be the one which he signed on said date:

"The affiant states that he resided in the same community with Robert H. Peery for several years before he entered the service of the Illinois Central, and that Peery was always considered and in fact was badly stooped, with his head extending forward and termed Humpy by a great many people in that vicinity."

This affiant says the following portion of the above is not true and he did not make such statements as "and that Peery was always considered and in fact was badly stooped, with his head forward and was termed Humpy by a great many people in that vicinity."

Affiant further states that he has never heard said Robert H. Peery called or designated by any such nick-name as "Humpy."

LEONARD J. RUST.

(Jurat.)

Affidavit of J. E. Houser.

Affiant J. E. Houser being first duly sworn deposes and says that he resides on a farm two miles west of Melber, Kentucky, and that he is the J. E. Houser who on the 7th day of April, 1914,
474 signed a statement at the solicitation of one Merritt Seay, purporting to give his knowledge of the physical condition of the plaintiff, Robert H. Peery; and that this affiant has on this day been shown the following affidavit purporting to be the one he signed on that date: .

"The affiant states that he has been personally acquainted with the plaintiff, Robert H. Peery, for several years and that before he began working for the railroad that he was a round shouldered man, with his head extending forward and was called Humpy by people in the community."

This affiant now states that he did not make the above statements, but on the contrary refused to say that the said Robert H. Peery was called Humpy by any one; this affiant further states that he was not well acquainted with said Peery; but that he has met him on two or three occasions; and that he has not seen Robert H. Peery for about twelve years; this affiant further states that he has never heard said Peery called or designated by any such nick-name as "Humpy."

J. E. HOUSER.

(Jurat.)

Affidavit of J. F. Bagby.

Affiant, J. F. Bagby, being first duly sworn deposes and says: that he resides on a farm near Melber, Kentucky; and he has this the 30th day of April, 1914, had read to him the following affidavit:

475 "The affiant states that he resides in the same community with Robert H. Peery before he entered the services of the railroad, and that Peery was always badly stooped, with his head forward, and walked slow and was known to his neighbors and friends as Humpy."

This affiant says that he did not make the above affidavit; that he was approached on the 2nd day of April, 1914, by one Merritt Seay, and did at the solicitation of said Seay sign a statement purporting to set forth this affiant's knowledge of said Peery's condition; and all this affiant intended to say, or in fact did say, in said affidavit was, that said Robert H. Peery was a little round shouldered, and that he did not say that said Peery "was known to his neighbors and friends as Humpy"; and that this affiant has never heard said Peery called or designated by any such nick-name as "Humpy."

This affiant further states that he cannot read or write.

J. F. BAGBY.
By E. S. BARRIGER.

(Jurat.)

Affidavit of Edward S. Barriger.

Affiant, Edward S. Barriger, being first duly sworn deposes and says that he resides on his own farm on the County Line Road, about four miles west of Melber, in Graves County, Kentucky; and that on this the 30th day of April, 1914, he was shown the
476 following affidavit purporting to have been made and signed by him on the 2nd day of April, 1914:

"The affiant states that he has been personally acquainted with Robert H. Peery for several years, and that before he was alleged to have been injured in a wreck on the Illinois Central in 1911, that Peery was a badly stooped man, with his head extending forward and not to be called an erect man at any time."

This affiant says that he did not make the above affidavit as set forth; that all this affiant intended to say and in fact all he did say was, that said Robert Peery was just a little round shouldered; and that he never intended to say and that he did not in fact say that "and was not to be called an erect man at any time."

This affiant further states that he never heard Robert H. Peery called or designated by any such nick-name as "Humpy."

EDWARD S. BARRIGER.

(Jurat.)

Affidavit of Cloyes Edwards.

Affiant, Cloyes Edwards, being first duly sworn deposes and says: that he resides on a farm about three miles west of Melber, Kentucky, and on the County Line Road; and that he is the Cloyes Edwards, who on April 2nd, 1914 signed an affidavit at the solicitation of one Merrit Seay purporting to give the affiant's knowledge
477 of the physical condition of the plaintiff, Robert H. Peery; and that this affiant has this 30th day of April, 1914, been shown an affidavit bearing his signature and purporting to be the affidavit which he made on the 2nd day of April, 1914:

"The affiant states that he is and has been personally acquainted with Robert H. Peery, plaintiff, for several years, and that he was a stoop shouldered man for years before he entered the service of the railroad, and he resided in the same community before Peery entered the railroad service, and that Peery's movements were always slow, with his head forward."

This affiant says that the above affidavit is not correct, in this, that the affiant did not intend to say and in fact did not say "and that he was a stooped shouldered man for years before he entered the service of the railroad"; affiant further says that he has n-ver heard said Perry being called by any such nick-nime as "Humpy."

CLOYES EDWARDS.

(Jurat.)

Affidavit of Charles E. Baldree.

Affiant Charles E. Baldree being first duly sworn deposes and says: that he resides on his own farm on the County Line Road, about three miles west of Melber, Kentucky; and that he has on this 30th day of April, 1914, been shown the following affidavit, purporting to be one signed by him on the 2nd day of April, 1914:

478 "The affiant states that he resided in the same community with Robert H. Peery for several years before he entered the service of the Illinois Central, and that Peery was always considered and in fact was badly stooped, with his head extending forward, and was termed Humpy by a great many people in that vicinity."

This affiant states that on the 2nd day of April, 1914, he did at the solicitation of one Merritt Seay sign an affidavit purporting to set forth his recollection of the physical condition of said Robert H. Peery, but that he did not read, nor did he have read to him the affidavit which he did sign; and that he did not intend to say and that he did not in fact say "that Peery was always considered and in fact was badly stooped, with his head extending forward, and was termed Humpy by a great many people in that vicinity."

This affiant further says that he has never heard said Peery called or designated by any such nick-name as "Humpy."

CHARLES E. BALDREE.

(Jurat.)

Affidavit of Thomas A. Howle.

Affiant, Thomas A. Howle, being first duly sworn deposes and says; that he resides on his own farm near Melber, in McCracken County, Kentucky; and that on this the 30th day of April, 1914, he was shown and had read to him the following affidavit purporting to have been made and signed by him on the 13th day of March, 1914.

479 "The affiant makes oath that he has been personally acquainted with Robert H. Peery for many years and that before he entered the service of the railroad, he lived in the same community, and that Peery was always a slow walker, short neck, head forward and stooped shouldered."

This affiant further states that he did on or about the 13th day of March, 1914, sign a statement purporting to describe the physical condition of said Robert H. Peery; this affiant further states that he did not know that the following words: "head forward and stooped shoulders" were in the statement he signed for Merritt Seay; and that he never intended and did not in fact say, or attempt to describe said Peery's condition in that way; this affiant further says that all that he intended to say and in fact all that this affiant did say was, that said Peery was a little round shouldered and not a long neck man; this affiant further says that he never at any time heard of said Peery being called or termed by any such nick-name as "Humpy."

THOMAS A. HOWLE.

(Jurat.)

Affidavit of J. H. Reeves.

Affiant J. H. Reeves being first duly sworn deposes and says that he resides on his own farm in Graves County, Kentucky, and that he is the same J. H. Reeves, who on the 2nd day of April, 1914, with reference to the physical condition of Robert H. Peery; this affiant says that he has never heard Robert H. Peery called or desig-
480 nated by any such nick-name as "Humpy."

J. H. REEVES.

(Jurat.)

Affidavit of Ive T. Courtney.

Affiant Ive T. Courtney, being first duly sworn, deposes and says that he lives on his farm near Melber in Graves County, Kentucky; and that on or about the 7th day of April, 1914, he was approached by one Merritt Seay and asked to sign a statement giving his knowledge of the physical condition of Robert H. Peery; said Merrit Seay asked this affiant if he knew Robert H. Peery and this affiant answered that he had seen him one time, and that when said Peery was riding as constable some twelve or thirteen years ago; this affiant further states that he never intended to say in his affidavit, and in fact did not say *that* "that Robert Peery was always a stoop shouldered man with his head forward, and never was erect and he was called humpy by many people on account of his shoulders being so badly stooped."

This affiant further says that he has never heard said Robert H. Peery called or designated by the nick-name "Humpy" except one time and that when approached by Merritt Seay for the purpose of getting said deposition.

I. T. COURTNEY.

(Jurat.)

481 *Affidavit of James E. Goode.*

Affiant James E. Goode, being first duly sworn, deposes and says that he is the same J. E. Goode who on the 2nd day of April, 1914, at the solicitation of one Merritt Seay signed an affidavit purporting to give his recollection of the physical condition of Robert H. Peery; and that this affiant has on this the 1st day of May, 1914, been shown the following statement purporting to be the contents of the said affidavit:

"The affiant states that he has been personally acquainted with Robert H. Peery for several years and that before he began working for the Railroad that he was a round shouldered man with his head extending forward and was called Humpy by people in the community."

This affiant now states that he never intended to say in said affidavit and that he did not say the following "was called Humpy by people in the community"; and that in fact this affiant has never

heard said Robert H. Peery called or designated as "Humpy" or any such nick-name.

JAMES E. GOODE.

(Jurat.)

Affidavit of John B. Mitchell.

Affiant John B. Mitchell, being first duly sworn, deposes and says that he is the John B. Mitchell, who on the 2nd day of April, 1914, at the solicitation of Merritt Seay signed an affidavit purporting to describe the physical condition of Robert H. Peery, and that
482 affiant has this 1st day of May, 1914, been shown the following affidavit purporting to be the one which he signed on said 2nd day of April, 1914, which in words was as follows:

"The affiant states that he has been personally acquainted with Robert H. Peery for several years and that before he was alleged to have been injured in a wreck on the Illinois Central in 1911, that Peery was a badly stooped man with his head extending forward and was not to be called an erect man at any time."

Affiant now says that he did not intend to say and that he did not in fact say "that Peery was a badly stooped man with his head extending forward and was not to be called an erect man at any time"; this affiant now states that what he did say to said Merritt Seay, and what he supposed he was taking an oath to was that said Robert H. Peery was a slightly round shouldered man with his head slightly forward; and this affiant further states that he never at any time heard said Peery called or termed by any such nick-name as "Humpy."

his
JOHN x MITCHELL.
mark.

(Jurat.

Affidavit of Luther Rust.

Affiant, Luther Rust, being first duly sworn, deposes and says, that he resides on his own farm on the County Line Road
483 in McCracken County near Melber; that he on or about the 2nd day of April, 1914, at the solicitation of one Merritt Seay made a short statement of the physical condition of the plaintiff, Robert H. Perry; and *that* this 29th day of April, 1914, been shown the following affidavit purporting to have been signed by him, as follows:

"The affiant states that he resided in the same community with Robert H. Peery before he entered the service of the Railroad and that Peery was always badly stooped with his head forward, and walked slow and was known to his neighbors and friends as Humpy."

The affiant now states that he did not on said date make the above statements, but that on the contrary the affiant stated to the above mentioned Merritt Seay that this affiant was only slightly acquainted with said Robert H. Peery and could not describe his physical con-

dition to anyone, further than that he was a slow motioned man; this affiant further states that the only man he ever heard call or designate Robert H. Peery by the nick-name "Humpy" was said Merritt Seay, and that only once, being the time when the statement was made to him by this affiant.

LUTHER RUST.

(Jurat.)

Affidavit of David Record.

Affiant, David Record, being first duly sworn, deposes and says that he resides on his farm in Graves County, Kentucky, near
484 Melber, Kentucky; that on or about the 3rd day of April, 1914, at the solicitation of one Merritt Seay, he made and signed a written statement, purporting to describe the physical condition of plaintiff, Robert H. Peery; this affiant further states that such written statement was not sworn to by him and that this was the only statement he has ever given with reference to Robert H. Peery up to the present time, and that he has just been shown and read the following affidavit to which his name appears to be signed:

"The affiant states that he resided in the same community with Robert H. Peery for several years before he entered the service of the Illinois Central, and that Peery was always considered and in fact was badly stooped, with his head extending forward and was termed Humpy by a great many people in that vicinity."

This affiant states that he never intended to say that the plaintiff, Robert H. Peery, was badly stooped, or that his head was extended forward, or that he was termed Humpy by a great many people in that community, but on the contrary he did not say any of these things; and that this affiant has never heard him called "Humpy" by anyone.

DAVID RECORD.

(Jurat.)

Affidavit of Eutra T. Mitchell.

Affiant, Eutra T. Mitchell, being first duly sworn, says that he is the E. T. Mitchell, who on the 6th day of April, 1914, at the
485 solicitation of one Merritt Seay signed what purported to be the affiant's recollection of the physical condition of Robert H. Peery, plaintiff, and that this affiant has this the 1st day of May been shown the following affidavit, purporting to be the one which he signed on said 6th day of April, 1914, which is in words and figures as follows:

"The affiant states that he has been personally acquainted with Robert H. Peery for several years and that Peery was badly stooped and not erect many years before 1911, and that in the community in which he resided before he began working for the railroad, that he was known to almost everbody as Humpy."

Affiant now says that he never signed any such affidavit as the foregoing; and that all this affiant intended to say, and all that he

did in fact say, was that said Peery was a little round shouldered and that his head was a little forward and that he was a slow moving man; this affiant further states that he has never in his life heard anyone call or designate said Peery by any such nick-name or term as "Humpy."

EUTRA T. MITCHELL.

(Jurat.)

Affidavit of James V. Sanderson.

Affiant, James V. Sanderson, being first duly sworn, deposes and says; that he is the J. V. Sanderson who on April 6th, 1914, signed an affidavit at the solicitation of one Merritt Seay; said affidavit a statement of the physical condition of Robert H. Peery
486 as this affiant recollected it at that time; on this 1st day of May, 1914, this affiant has been shown and had read to him the following affidavit, purporting to be the one he signed on said 6th day of April, 1914:

"The affiant states that he resided in the community with Robert H. Peery before he entered the service of the railroad and that Peery was always badly stooped with his head forward, and walked slow and was known to his neighbors and friends as Humpy."

This affiant now says that he did not intend to say in his affidavit and that he did not in fact say "that Peery was always badly stooped"; or that "and was known to his neighbors and friends as Humpy"; what this affiant intended to say and what this affiant thought he was signing was, that said Peery was a little round shouldered and was slow in his motion and nothing more; this affiant says that he has never heard said Peery called or designated by any such nick-name as "Humpy."

J. N. SANDERSON.

(Jurat.)

Affidavit of Jos-ph M. Reynolds.

Affiant, Joseph M. Reynolds, being first duly sworn, deposes and says: that he is the J. M. Reynolds who on the 2nd day of April, 1914, signed an affidavit at the solicitation of one Merritt Seay purporting to give this affiant's recollection of the appearance of Robert H. Peery; this affiant has this 1st day of May been shown an affidavit purporting to be the one he made on the 2nd
487 day of April, 1914, which reads as follows:

"The affiant states that he has been personally acquainted with Robert H. Peery for several years and that before he began working for the railroad that he was a round shouldered man with his head extending forward and was called Humpy by people in the community."

This affiant now says that he did not intend and in fact did not say in his affidavit the following words: "and was called Humpy by people in the community"; but on the contrary this affiant says

that he has never heard the plaintiff, Robert H. Peery, called or designated by any such nick-name as "Humpy."

his
JOSEPH M. X REYNOLDS.
mark.

Witness:
D. MARK,
C. A. WICKLIFFE.

(Jurat.)

Affidavit of Anthony W. Garnett.

Affiant, Anthony W. Garnett, being first duly sworn, deposes and says that he is the A. W. Garnett who on the 3rd day of April, 1914, signed an affidavit purporting to describe the physical condition of the plaintiff, Robert H. Peery, and that this affiant has just been shown the following affidavit bearing his name and purporting to be the one he signed on that date:

"The affiant states that he has been personally acquainted with Robert H. Peery for several years and that before he began working for the Railroad that he was a round shouldered man with
488 his head extending forward and was called Humpy by people in the community."

Affiant further says that he did not intend to say and in fact did not in the affidavit that he signed say said Peery "was a round shouldered man with his head extending forward and was called Humpy by people in the community." This affiant now says that all he did say was, that he was not really personally acquainted with said Peery, and that he had just seen him and just knew him when he saw him, and that as he knew him he was heavy-set, healthy looking man; this affiant now says that he never heard said Peery called or termed by any such nick-name as "Humpy."

A. W. GARNETT.

(Jurat.)

Affidavit of Thomas H. Garnett.

Affiant, Thomas H. Garnett, being first duly sworn, says that he is the T. H. Garnett, who on the 3rd day of April, 1914, at the solicitation of one Merritt Seay signed a statement purporting to give his recollection of the physical condition of Robert H. Peery prior to said Peery's entering the service of the Illinois Central Railroad Company, and that this 1st day of May, 1914, affiant was shown and read the following affidavit purporting to be the one he signed on said 3rd day of April, 1914:

"The affiant states that he is and has been personally acquainted with Robert H. Peery, plaintiff, for several years, and that he was a stooped shouldered man for years before he entered
489 the service of the railroad, and that he resided in the same community before Peery entered the railroad service and that Peery's movements were always slow with his head forward."

This affiant stated to Merritt Seay that he had not seen said Peery for ten years; and that all this affiant could recollect about said Peery was, that he might have been a little round shouldered, but not stoop shouldered, and that he might have carried his head a little forward; that this affiant never intended to say, and in fact did not say in said affidavit that said Peery was "a stooped shouldered man for years."

This affiant further says that he has never heard said Peery called or designated by any such nick-name as "Humpy."

T. H. GARNETT.

(Jurat.)

Affidavit of John W. Edwards.

Affiant, John W. Edwards, being first duly sworn, deposes and says that he is the J. W. Edwards who on the 2nd day of April, 1914, made an affidavit in the above entitled action; affiant says that it was not his intention in said affidavit to convey the impression that said Robert H. Peery was "stoop shouldered," but that he did intend to say that he was slightly round shouldered; and that this affiant has never heard him called or designated by any such nick-name as "Humpy."

JOHN W. EDWARDS.

(Jurat.)

490 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

ROBERT H. PEERY, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Order upon Defendant's Motion.

This cause came before this Court at Special Term and was heard upon the pleadings and settled case and papers attached to the motion upon the motion of the defendant above named, for an order (1) setting aside the verdict of the jury in favor of the plaintiff, and directing that judgment be entered in favor of the defendant notwithstanding the verdict, and (2) if said motion be denied, for an order granting a new trial of this action. Whereupon Mr. Hoke appeared in favor of said motion and Mr. Anderson, contra. Now, after hearing counsel for the respective parties, and inspecting said settled case and the affidavits, pro and con, attached to the moving papers and all the files,

Ordered (1) that the motion of said defendant for an order granting judgment in its favor notwithstanding the verdict is denied.

Ordered (2) that unless the plaintiff file in this action within thirty (30) days from the date of this order a stipulation and agree-

ment in writing that the verdict in $12,000, heretofore rendered herein in his favor shall be reduced to the sum of nine thousand ($9,000) dollars and to accept said verdict so reduced in place of the verdict as it now stands, the defendant's motion for a new trial hereof be granted; otherwise, and on the filing of said stipu-
491 lation and agreement reducing said verdict said motion of defendant for a new trial is denied.

Dated at St. Paul, July 17, A. D. 1914.

WILLIAM LOUIS KELLY,
District Judge.

Memorandum.

The defendant's motion is predicated, first, upon alleged errors of law by the Court, marked in its notice I to X inclusive. Each of these, except X because the Court took the law of the case from the opinion of the supreme court of Minnesota, in which it held upon the same identical facts as appeared on this trial, that plaintiff and defendant, at the time of the injury were engaged in interstate commerce. See Peery v. Illinois Central Railroad Co., 123 Minn. 264; (143 N. W. Rep. 724). There could be no error in following this decision.

The alleged error marked X is nothing but the preliminary statement of the plaintiff's claims from the plaintiff's complaint, and its use was necessary that the jury might understand what the controversy covered or embraced.

It will be readily seen that the ingenious gentleman who framed the arraignment of the Court marked X, cut these words bodily out of the charge and from their legitimate connection so as to endeavor to make them appear as the words and charge of the Court and not merely the claims of the plaintiff from the complaint. The Court cannot commend this practice. Mere recitals from the plead-
492 ings are not statements of the law by the Court.

There was no matter of fact to submit to the jury as to whether or not plaintiff was when injured engaged in interstate commerce, that had not already been determined by the supreme court.

Counsel for defendant claims that since the supreme court of Minnesota declared the law in this case,—143 N. W. 724, supra, the supreme court of the United States in Illinois Central R. R. Co. v. Joseph Behrens, Admr., etc., has under the facts recited in that opinion virtually held that the plaintiff under the facts in this case was not engaged in interstate commerce when injured.

This Court has no quarrel with this opinion of the court of last resort. It is good law and sound common sense. But its facts are so entirely different from the facts in this case that it cannot affect the law here as settled by the Minnesota supreme court.

I find no error of law in the record of this trial. But I am satisfied that under the evidence the damages, in justice, should be somewhat reduced. The injuries suffered by the plaintiff were undoubt-

edly severe, but I doubt from the testimony of the physicians that he will be permanently disabled.

As to the alleged newly discovered evidence, under the settled rules, there is not a showing of proper diligence. And as they relate to plaintiff's physical condition, which was tried out before the jury, they are cumulative.

493 The affidavits offered by defendant are sixty (60) in number, while plaintiff presents one hundred and seven (107) affidavits in opposition. Of these twenty-three (23) purport to be from persons who had signed affidavits for the defendant and which in part these last affidavits repudiate. All of which tends strongly to show how easy it sometimes is to obtain affidavits, and of how little value they sometimes are. The use of these affiants' testimony would not change the result.

KELLY, *J.*

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

ROBERT H. PEERY, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Whereas the above named Court made and filed with the Clerk of the above entitled Court an order granting the motion of the defendant for a new trial unless the plaintiff consents to a reduction of his verdict from twelve thousand dollars to nine thousand dollars, and in said order denies said motion for a new trial in case said written consent to said reduction to nine thousand dollars is filed,

Now therefore, the plaintiff above named, through his attorneys, hereby consents to and accepts said reduction from twelve thousand dollars to nine thousand dollars.

SAMUEL A. ANDERSON,
A. F. STOREY,
Attorneys for Plaintiff.

494 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

ROBERT H. PEERY, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Notice of Appeal.

Please take notice that the defendant, Illinois Central Railroad Company hereby appeals to the Supreme Court of the State of Minne-

sota from that certain order made and filed by the Court herein on July 17th, 1914, denying defendant's motion for judgment in its favor notwithstanding the verdict heretofore rendered herein, and denying defendant's motion for a new trial herein if plaintiff consented to a reduction of the verdict from $12,000.00 to $9,000.00, which plaintiff has done, and from the whole of said order.

Dated July 20th, 1914.

BUTLER & MITCHELL,
Attorneys for Defendant.

624 Endicott Building, St. Paul, Minnesota.

To Samuel A. Anderson and A. F. Storey, Esquires, Attorneys for Plaintiff, St. Paul, Minnesota.

Due service of the above notice of appeal is admitted this 20th day of July, 1914, and costs and supersedeas bond upon said appeal is hereby waived, it being agreed that all proceedings on the part of the plaintiff be stayed herein pending said appeal.

SAMUEL A. ANDERSON,
A. F. STOREY,
Attorneys for Plaintiff.

Due service of above notice of appeal is hereby admitted this 20 day of July, 1914.

MATT JENSEN,
Clerk of the District Court.

495 STATE OF MINNESOTA,
County of Ramsey:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court, Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original Notice of Appeal and Waiver in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said Court, this 25th day of July, A. D. 1914.

[SEAL.]

MATT JENSEN, *Clerk,*
By G. P. RITT, *Deputy.*

(Endorsed:) Filed July 25, 1914. I. A. Caswell, Clerk.

496 STATE OF MINNESOTA:

In Supreme Court, October Term, 1914.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Assignments of Error.

Filed Dec. 8, 1914. I. A. Caswell, Clerk.

497 I.

The court erred in denying appellant's motion for judgment in its favor notwithstanding the verdict made, upon the ground that the evidence wholly fails to establish that at the time of the happening of the accident involved herein respondent was either employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act (Act of Congress April 22, 1908, 35 Stat. 65), and that consequently respondent is not entitled to recover against the appellant herein. Fol. 1128.

II.

The court erred in denying appellant's motion for a new trial herein upon the ground:

"That the verdict is not justified by the evidence, because the evidence is not sufficient to justify a finding that plaintiff at the time of the happening of the accident involved herein was either employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat. 65), and consequently is not sufficient to justify a recovery by plaintiff herein.

III.

The court erred in denying appellant's motion for a new trial herein, made upon the ground:

"That the verdict is contrary to law because the evidence wholly fails to establish that plaintiff was at the time of the happening of the accident involved herein either employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat. 65)".

498 IV.

The court erred in denying appellant's motion for a new trial herein, made upon the ground:

"The court erred in charging the jury as follows: 'Now the answer in this case, gentlemen, admits the incorporation and general business of the defendant railroad company, and while it puts

at issue the question whether the defendant was engaged at the time of the accident in carrying on what familiarly is called interstate commerce, this question as to its character has already been to the Supreme Court of this state upon an appeal heretofore taken upon certain questions raised here at a former trial and the supreme Court has held, upon questions substantially as I understand the facts are here today, that this defendant railroad company was in fact engaged in what is known as interstate commerce and that this plaintiff was, as its servant, engaged also in interstate commerce, and as I recall, counsel for the defendant in his address to the jury has said that there is substantially no difference between the facts in this case as they appear here upon this trial and the facts as they were passed upon by the Supreme Court of this State, and therefore it becomes my duty to say to you that so far as the law of this case is concerned, you will judge the plaintiff's case, and the defendant's also, by the act of Congress regulating what is known as interstate commerce, and the plaintiff—each party—is entitled to the rights and to the benefits conferred by that act.'

Because, in so charging the jury, the court in effect instructed the jury that the rules of law embodied in the so-called Employers' Liability Act (Act of Congress, April 22, 1908, 35 Stat. 65) were applicable to this case, which was erroneous, because the evidence
499 fails to establish that plaintiff was, at the time of the happening of the accident involved herein, either employed or engaged in interstate commerce within the meaning of the said Federal Employers' Liability Act."

V.

The court erred in denying appellant's motion for a new trial herein, made upon the ground:

"The Court erred in itself determining as a matter of law, instead of submitting to the jury for determination, the question whether plaintiff was at the time of the happening of the accident involved herein employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat. 65); and in assuming in its instructions to the jury, as above set forth, as a matter of fact, that the plaintiff was employed in interstate commerce at the time of his injury; and in stating in said instructions the conditions or right in plaintiff to recover without including therein proof that plaintiff was at the time of his injury actually employed in interstate commerce."

VI.

The court erred in denying appellant's motion for a new trial herein, made upon the ground:

"The Court erred in so construing the Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat. 65) as permitting the court, under the facts proven an- stipulated, to decide as a matter

of law that the plaintiff was at the time employed in inter-
500 state commerce, and to so instruct the jury as to permit a verdict for the plaintiff without finding that he was employed in interstate commerce at the time he was injured."

VII.

The court erred in denying appellant's motion for a new trial herein, made upon the ground:

"The court erred in construing the Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat. 65) to apply to an employe of the defendant employed in the work being done by plaintiff at the time he was injured."

VIII.

The court erred in denying appellant's motion for a new trial herein, made upon the ground:

"The Court erred in instructing the jury as above set forth in ignoring the evidence introduced by the defendant explaining the character of the plaintiff's employment at the time he received his injury, or in assuming, as a matter of fact, that under such evidence the plaintiff was at said time employed in interstate commerce."

IX.

The court erred in denying appellant's motion for a new trial herein, made upon the ground:

"The court erred in charging the jury as follows:

'Now, under the law under which this case is being tried—the act of congress—if you find from the evidence that the plaintiff is guilty of any negligence which contributed to his injury—this negligence will not defeat the plaintiff's right to a recovery, but under the act of congress, in assessing the plaintiff's damages, you must diminish the damages in the proportion as you find it to be, the defendant company's—that is, the carrier's—negligence, bore to
501 the combined negligence of both the plaintiff and the defendant.'

Because in so charging the jury, the court erroneously construed the provisions of the so-called Federal Employers' Liability Act (Act of Congress, April 22, 1908, 35 Stat. 65) with respect to the matter of contributory negligence."

X.

The court erred in denying appellant's motion for a new trial herein, made upon the ground:

"The court erred in charging the jury, as follows:

'And while said locomotive engine and train with the plaintiff thereon, in the performance of his duties, was being thus run and operated, the defendant and certain of its servants and agents, in

charge thereof, carelessly ran another of defendant's locomotive engines along and over said track, and in a northerly direction and up to and against the locomotive engine and train upon which the plaintiff was riding and carelessly caused the said two trains to collide with great force and violence, and carelessly caused the same to be broken and crushed and carelessly caused said plaintiff to be caught in said collision and wreckage and then and there very severely injured; that said collision and injuries were caused through the carelessness of the defendant and its servants and agents in charge of said other engine, and that under and pursuant (I need not read this, the common law of Kentucky, is out of it) the defendant was liable and responsible for the negligent acts, etc. That the plaintiff at no time knew, and that he had no means of knowing, that said other engine was approaching the train upon which the plaintiff was riding or likely to collide with the same. He alleges further that at the time of the accident he was 38 years of age, an experienced
502 and capable railroad man; that he had been engaged in railroading for many years and that he was earning as such conductor and was capable of earning wages averaging at least $120 per month. That previous to said accident he had always been in good health; that by said accident he was severely and permanently injured upon and about his chest and back, and one of his shoulders; that his collar bone was broken; that he received a very severe nervous shock; that he has been totally disabled and incapaciated ever since said accident and has continuously suffered pain and anguish both of mind and body and that the injuries thus received, as the plaintiff is informed and verily believes, are permanent and that he will, during the rest of his life, to a very large degree, be disabled and incapacitated and that he is informed and verily believes he will never be able to again engage in any lucrative occupation save and except in a slight degree, and as he is informed and verily believes he will suffer great pain and anguish both of body and mind. He then alleges that by reason of these facts, he has been damages by the defendant in the sum of $25,000 and he demands judgment in that sum.'"

XI.

The court erred in denying appellant's motion for a new trial herein, made upon the ground:

"Excessive damages appearing to have been given under the influence of passion or prejudice."

BUTLER & MITCHELL,
Attorneys for Appellant.

503 18946.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 168.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL R. R. COMPANY, Appellant.

Syllabus.

Ruling on a former appeal in this case, that it is within the operation of the Federal Employers' Liability Act, adhered to.

The failure of the trial court to heed the views of this court, heretofore expressed, with regard to reading pleadings to the jury in the course of the charge, held error, but not prejudicial so as to warrant reversal.

Verdict of $9,000, reduced by the trial court from $12,000, held not excessive, in an action by a railroad conductor for damages sustained through the negligence of defendant.

Order affirmed.

504 18946.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 168.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL R. R. COMPANY, Appellant.

Opinion.

In this —, an action for personal injuries based upon the Federal Employers' Liability Act, plaintiff had a verdict. Defendant appealed from an order denying its alternative motion.

1. The case was here on plaintiff's appeal, reported in 123 Minn. 264, where the facts are stated and it was held, upon substantially the same evidence presented by the present record, that the Federal Act applied, or at least that its applicability should have been submitted to the jury; the only new fact brought out on the second trial in this connection being that plaintiff, a freight conductor, at the time of his injury, was making out his reports showing the amount and causes of delays at or between stations, covering the entire trip from and back to Paducah.

Defendant contends that the evidence was sufficient to justify a finding that plaintiff, when injured, was either employed or engaged in interstate commerce, and, further, that in any event it was error to determine this question in his favor as a matter of law as the court below did, instead of submitting it to the jury. Taking up the latter question first, we find no error. The facts being undisputed and the inferences clear, there was nothing for the jury to pass on in this connection.

505 On the main question, defendant urges that the decision of the United States Supreme Court, in Illinois etc. R. Co. v. Behrens, 233 U. S. 473, rendered since the case was here before, requires the overruling of our former holding. In Counsing v. Illinois etc. R. Co., 148 N. W. 58, the Behrens case was considered in connection with the Pedersen case, 229 U. S. 146, on which the decision on plaintiff's appeal was largely based, Mr. Justice Bunn saying:

"Counsel for defendant correctly say that the decision in the Pedersen Case has apparently warranted the conclusion that the Federal Supreme Court would ultimately construe the act of Congress as applicable to practically all employes of interstate railroads, except possibly those engaged in the work of new construction of instrumentalities as distinguished from repairs upon old instrumentalities. But they refer to the case of Illinois Central R. R. Co. v. Behrens, 233 U. S. 437, 34 Sup. Ct. 646, 58 L. Ed. —, decided by the Supreme Court April 27, 1914, as indicating a less liberal construction of the act. We do not see that the Behrens case is in point. The employe was at the time of the injury engaged in moving cars loaded wholly with intrastate freight from one part of the city to another, and it was held that this was not a service in interstate commerce.

This court held that "under the test laid down in the Pedersen Case and approved in the Behrens Case," namely, whether the work in question was a part of the interstate commerce in which the carrier was engaged, an employe of an interstate and intrastate carrier, who was wheeling coal for use in the company's shops where cars were being repaired which had been and were used in inter-

506 state commerce, was within the protection of the Federal Act.

We have considered the Behrens case in the light of counsel's argument, and, finding nothing therein inconsistent with the views expressed in our former opinion, adhere thereto.

2. Error is assigned to the action of the court in reading, in the course of its charge, portions of the complaint. This was error, as to which nothing need be added to what was said in Savino v. Griffin Wheel Co., 118 Minn. 290, 294. However, error does not warrant a reversal unless coupled with prejudice; and, taking the charge as a whole we are unable to say that defendant was prejudiced by the court's failure to heed the views heretofore expressed by this court upon the practice in question. Moreover, no objection was made thereto on the trial.

3. Defendant claims that the damages were so excessive as to appear to have been awarded under the influence of passion or prejudice. The court reduced the verdict from $12,000 as rendered, to

$9,000. Plaintiff, at the time of his injury, was thirty-eight years old, and earning from $125 to $130 per month. Up to the time of the last trial he had been practically idle for more than two years; and it also appeared that, besides minor injuries, his height was reduced two inches and that he now has a forward curvature and stiffness of the upper portions of his spine and in his neck, resulting in a permanently stooped position. The evidence, which it is not necessary to discuss in detail except to say that the medical testimony was sharply and unusually conflicting, was ample to susutain a finding of stiffness in the right shoulder joint, resulting in inability to raise the arm above a horizontal position; that these conditions were permanent; that plaintiff was likely to be considerably incapacitated, and would suffer more or less pain. We are unable to say that the verdict warrants the imputation contended for or that, as reduced, it is excessive.

507

Order affirmed.

PHILIP E. BROWN, *J.*

(Endorsed:) Filed Dec. 31, 1914. I. A. Caswell, Clerk.

508 State of Minnesota, Supreme Court, General October Term, A. D. 1914.

Wednesday morning, 9:30 o'clock, December 16, A. D. 1914, Court convened pursuant to adjournment.

Reg. No. 18946; Cal. No. 168.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[SEAL.] I. A. CASWELL, *Clerk,*
By —— ——, *Deputy.*

(Endorsed:) Filed Jan. 22, 1915. I. A. Caswell, Clerk.

509 State of Minnesota, Supreme Court, October Term, A. D. 1914.

No. 168.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Appeal from District Court, Second Judicial District, County of *Judicial.*

This cause having been duly argued and submitted at the General October Term of this court A. D. 1914, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that judgment be entered accordingly.

Entered January 22, A. D. 1915.

By the Court,

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

[SEAL.] I. A. CASWELL, *Clerk.*

(Endorsed:) Filed Jan. 22, 1915. I. A. Caswell, Clerk.

510 State of Minnesota, Supreme Court, October Term, A. D. 1914.

No. 168.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause January 22, A. D. 1915.

It is here and hereby determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent

above named, do have and recover of said Appellant herein the sum and amount of Forty-five and 50/100 dollars, ($45.50) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed January 22, A. D. 1915.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs $25.00. Printer $9.50. Clerk $11.00. Acknowledgments $—. Return $—. Postage and Express $—. Filing Mandate $—. Total $45.50.

511 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, January 22, A. D. 1915.

[Seal of the Supreme Court, State of Minnesota.]

[SEAL.]

I. A. CASWELL, *Clerk,*
By V. C. PIDGEON, *Deputy.*

State of Minnesota, Supreme Court.

Transcript of Judgment.

Filed Jan. 22, A. D. 1915. I. A. Caswell, Clerk.

512 No. 1846.

State of Minnesota, Supreme Court.

ROBERT H. PEERY, Respondent,
against
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Judgment Roll.

Filed January 22, 1915. I. A. Caswell, Clerk.

513 STATE OF MINNESOTA,
Supreme Court, ss:

Mandate.

The State of Minnesota to the Hon. Judge and officers of the District Court of the Second Judicial District sitting within and for the County of Ramsey, Greeting:

Whereas, Lately in your Court, in an action therein pending, between Robert H. Peery, Plaintiff, and Illinois Central Railroad Company, Defendant, a certain order was entered therein July 17, 1914, for which action of your Court an appeal thereafter was taken to this Court:

And Whereas, The same was duly argued, heard and submitted; and after mature deliberation thereon had, our Supreme Court did adjudge, determine, decree and order "that the order of the Court below herein appealed from, be, and the same hereby is, in all things affirmed and adjudged be entered accordingly." A copy of the entry of Judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

Now, Therefore, This Mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your Court for such other further record and proceedings therein as many be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, The Hon, Calvin L. Brown, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this 22nd day of January, 1915.

[Seal of the Supreme Court State of Minnesota.]

I. A. CASWELL,
Clerk of the Supreme Court.
By —— ——, *Deputy.*

514 Supreme Court, State of Minnesota.

Mandate to the District Court of Ramsey County.

(Endorsed:) Filed Jan. 23, 1915. Matt Jensen, Clerk.

515 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

No. 109275.

ROBERT H. PEERY, Plaintiff,
against
ILLINOIS CENTRAL RAILROAD Co., Defendant.

Pursuant to the verdict of the jury duly rendered and filed in the above entitled action on the 24th day of February A. D. 1914;

Now, on motion of S. A. Anderson, Esq., said Attorney, it is hereby adjudged that the plaintiff herein recover of said Defendant Illinois Central Railroad Co. the sum of Ninety four hundred ninety six and 50/100 Dollars damages, with One hundred fifty nine and 01/100 Dollars costs and disbursements, in all amounting to $9655.51.

Signed this 25th day of January, A. D. 1915.

MATT JENSEN, *Clerk,*
By G. A. JOHNSON,
Deputy Clerk.

(Endorsed:) Judgment Roll. Filed 25 day of January, A. D. 1915. Matt Jensen, Clerk. By G. Johnson, Deputy.

516 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

ROBERT H. PEERY, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

To the above named Plaintiff and to Mr. Samuel A. Anderson, Attorney for Plaintiff, St. Paul, Minn.:

Please take notice, that the above named defendant, Illinois Central Railroad Company, hereby appeals to the Supreme Court of the State of Minnesota from that certain judgment entered herein in favor of Robert H. Peery, plaintiff, and against Illinois Central Railroad Company, defendant, on January 25th, 1915, in the sum

of Nine Thousand Six Hundred and Fifty-five Dollars and Fifty-one Cents ($9,655.51), and from the whole thereof.

Dated Feb. 2nd, 1915.

BUTLER & MITCHELL,
Attorneys for Defendant.

624 Endicott Building, St. Paul, Minnesota.

Due service of the above notice of appeal is hereby admitted this 2nd day of February, 1915, and costs and disbursements bond upon said appeal is hereby waived.

(Signed) S. A. ANDERSON,
Attorney for Plaintiff.

Due service of the above notice of appeal is hereby admitted this 2nd day of February, 1915.

MATT JENSEN,
Clerk of said Court.

(Endorsed:) Filed Feb. 2, 1915. Matt Jensen, Clerk, by G. P. Ritt, Deputy.

517 STATE OF MINNESOTA,
County of Ramsey:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court, Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original Notice of Appeal and Waiver of Bond in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said Court, this 2nd day of February, A. D. 1915.

[SEAL.] MATT JENSEN, *Clerk,*
By G. P. RITT, *Deputy Clerk.*

(Endorsed:) Filed Feb. 2, 1915. I. A. Caswell, Clerk.

518 STATE OF MINNESOTA:

Supreme Court. October Term, 1914.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

It is hereby stipulated and agreed, by and between the above named parties and their respective attorneys, that the appeal from

the judgment rendered by the District Court of Ramsey County herein may be submitted upon the briefs and arguments of the attorneys for the respective parties heretofore submitted in connection with the former appeal herein from the order denying appellant's motion for judgment in his favor notwithstanding the verdict or for a new trial.

Dated February 2nd, 1915.

S. A. ANDERSON,
Attorneys for Respondent.
BUTLER & MITCHELL,
Attorneys for Appellant.

(Endorsed:) Filed Feb. 2, 1915. I. A. Caswell, Clerk.

519 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 168.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL R. R. Co., Appellant.

Per Curiam:

This is an appeal from a judgment. The facts, and the law applicable thereto, are sufficiently stated on an appeal from an order in the same case, reported in 150 N. W. 382. For the reasons there stated it is ordered that the judgment stand affirmed.

(Endorsed:) Filed Feb. 5, 1915. I. A. Caswell, Clerk.

520 STATE OF MINNESOTA:

Supreme Court, October Term, 1914.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Stipulation with Respect to Entry of Judgment.

By way of agreeing upon the amount of the judgment herein, and without waiver by either party of any rights herein, except as to the precise amount of such judgment and any formalities as to its entry,

It is hereby stipulated by and between the parties hereto that the Clerk of said Court be and he hereby is authorized and requested to enter final judgment in said Court pursuant to the decision of

the Court herein, and not otherwise, in favor of said respondent and against said appellant, for the sum of $9761.75, which includes the amount of the judgment entered in this action in the District Court of Ramsey County, Minnesota, on January 25, 1915, the amount of the judgment for costs and disbursements in this Court upon the former appeal by the Illinois Central Railroad Company from the order herein, entered January 22, 1915, and respondent's costs and disbursements and Clerk's fees upon the appeal from the judgment herein, which said judgments are to be considered as merged in the judgment so to be entered pursuant to this stipulation.

Dated February 13, 1915.

S. A. ANDERSON,
Attorneys for Respondent.
BUTLER & MITCHELL,
Attorneys for Appellant.

(Endorsed:) Filed Feb. 15, 1915. I. A. Caswell, Clerk.

521 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 168.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the General October Term of this court A. D. 1914 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is in all things affirmed and that judgment be entered accordingly.

Entered February 15 A. D. 1915.

BY THE COURT.

Attest:
I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

[SEAL.]

Attest:

I. A. CASWELL, *Clerk.*

(Endorsed:) Filed Feb. 15, 1915. I. A. Caswell, Clerk.

522 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 168.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause February 15 A. D. 1915.

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Nine Thousand Seven Hundred Sixty-one and 75/100 Dollars, ($9,761.75) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed February 15 A. D. 1915.

BY THE COURT.

Attest:
I. A. CASWELL, *Clerk.*

Statement of Judgment.

Statutory Costs $ —. Printer $—. Clerk $—. Acknowledgments $ —. Return $ —. Postage and Express $ —. Filing Mandate $ —. Stipulated amount of judgment $9,761.75. Total $9,761.75.

523 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, February 15 A. D. 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

STATE OF MINNESOTA,
Supreme Court:

Transcript of Judgment.

Filed Feb. 15 A. D. 1915. I. A. Caswell, Clerk.

524 No. 18946.

STATE OF MINNESOTA,
Supreme Court:

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Judgment Roll.

Filed February 15, 1915. I. A. Caswell, Clerk.

525 *Authentication of Record.*

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Robert H. Peery, Respondent, vs. Illinois Central Railroad Company, Appellant, and also of the assignments of error to said court and of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 1st day of March, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

526 STATE OF MINNESOTA:

In Supreme Court, October Term, 1914.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Assignment of Errors and Prayer for Reversal.

Now comes the above named appellant, and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case wherein was

drawn in question the construction of a statute of the United States, to-wit: the so-called Employers' Liability Act (Act of Congress, April 22, 1908, 35 Stat. 65), and the decision was against the right, privilege and immunity specially set up and claimed by appellant under said statute of the United States, and, for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

I.

The Supreme Court of the State of Minnesota erred in holding and deciding that under the evidence in this case the plaintiff, Robert H. Peery, at the time of his injury, was engoged in and employed by defendant Illinois Central Railroad Company in interstate commerce and entitled to the benefits of the Federal Employers' Liability Act (Act of Congress, April 22, 1908, 35 Stat. 65).

527

II.

The Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court of Ramsey County, Minnesota, which rightfully, according to law, should instead have been reversed, because the said District Court of Ramsey County, Minnesota, had erred in denying defendant Illinois Central Railroad Company's motion for judgment in its favor notwithstanding the verdict made upon the grounds that,

"The evidence herein wholly fails to establish that at the time of the happening of the accident involved herein plaintiff was either employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act (Act of Congress April 22, 1908, 35 Stat. 65), and that consequently plaintiff is not entitled to recover against the defendant herein." (P. B. F. 1128)

III.

The Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court of Ramsey County, Minnesota, herein, which rightfully, according to law, should instead have been reversed because the said District Court of Ramsey County, Minnesota, had erred in denying defendant Illinois Central Railroad Company's motion for a new trial made upon the following ground:

"That the verdict is not justified by the evidence, because the evidence is not sufficient to justify a finding that plaintiff at the time of the happening of accident involved herein was either employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat. 65) and consequently is not sufficient to justify a recovery by plaintiff herein." (P. B. F. 1129-30.)

IV.

The Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court of Ramsey County, Minnesota

herein, which rightfully, according to law, should instead have been reversed because the said District Court of Ramsey County,
528 Minnesota had erred in denying defendant Illinois Central Railroad Company's motion for a new trial made upon the following ground:

"That the verdict is contrary to law because the evidence wholly fails to establish that plaintiff was at the time of the happening of the accident involved herein either employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat. 65)." (P. B. F. 1131.)

V.

The Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court of Ramsey County, Minnesota herein, which rightfully, according to law, should instead have been reversed because the said District Court of Ramsey County, Minnesota, had erred in denying defendant Illinois Central Railroad Company's motion for a new trial made upon the following ground:

"The court erred in charging the Jury as follows: 'Now the answer in this case, gentlemen, admits the incorporation and general business of the defendant railroad company, and while it puts at issue the question whether the defendant was engaged at the time of the accident in carrying on what familiarly is called interstate commerce, this question as to its character has already been to the Supreme Court of this state upon an appeal heretofore taken upon certain questions raised here at a former trial and the Supreme Court has held, upon questions substantially as I understand the facts are here today, that this defendant railroad company was in fact engaged in what is known as interstate commerce and that this plaintiff was, as its servant, engaged also in interstate commerce, and as I recall, counsel for the defendant in his address to the jury has said that there is substantially no difference between the facts in this case as they appear here upon this trial and the facts as they were passed upon by the Supreme Court of this State, and therefore it becomes my duty to say to you that so far as the law of this case is concerned, you will judge the plaintiff's case, and the defendant's also, by the act of congress regulating what is known as interstate commerce, and the plaintiff—each party—is entitled to the rights and to the benefits conferred by that act.'

Because in so charging the jury, the court in effect instructed the jury that the rules of law embodied in the so-called Employers' Liability Act (Act of Congress, April 22, 1908, 35 Stat. 65) were applicable to this case, which was erroneous, because the evidence fails to establish that plaintiff was, at the time of the happening of the accident involved herein, either employed or engaged in interstate commerce within the meaning of the said Federal Employers' Liability Act." (P. B. F. 1131-35.)

529 VI.

The Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court of Ramsey County, Minnesota, herein, which rightfully, according to law, should instead have been reversed because the said District Court of Ramsey County, Minnesota, had erred in denying defendant Illinois Central Railroad Company's motion for a new trial made on the following ground:

"The Court erred in itself determining as a matter of law, instead of submitting to the jury for determination, the question whether plaintiff was at the time of the happening of the accident involved herein employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat. 65); and in assuming in its instructions to the jury, as above set forth, as a matter of fact, that the plaintiff was employed in interstate commerce at the time of his injury; and in stating in said instructions the conditions or right in plaintiff to recover without including therein proof that plaintiff was at the time of his injury actually employed in interstate commerce." (P. B. F. 1136.)

VII.

The Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court of Ramsey County, Minnesota, herein, which rightfully, according to law, should instead have been reversed because the said District Court of Ramsey County, Minnesota, had erred in denying defendant Illinois Central Railroad Company's motion for a new trial made upon the following ground:

"The court erred in so construing the Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat. 65) as permitting the court, under the facts proven and stipulated, to decide as a matter of law that the plaintiff was at the time employed in interstate commerce, and to so instruct the jury as to permit a verdict for the plaintiff without finding that he was employed in interstate commerce at the time he was injured." (P. B. F. 1137.)

530 VIII.

The Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court of Ramsey County, Minnesota, herein, which rightfully, according to law, should instead have been reversed because the said District Court of Ramsey County, Minnesota, had erred in denying defendant Illinois Central Railroad Company's motion for a new trial made upon the following ground:

"The Court erred in construing the Federal Employers' Liability Act (Act of Congress, April 22nd, 1908, 35 Stat. 65) to apply to an employe of the defendant employed in the work being done by plaintiff at the time he was injured." (P. B. F. 1138.)

IX.

The Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court of Ramsey County, Minnesota, herein, which rightfully, according to law, should instead have been reversed because the said District Court of Ramsey County, Minnesota, had erred in denying defendant Illinois Central Railroad Company's motion for a new trial made upon the following ground:

"The Court erred in instructing the jury as above set forth in ignoring the evidence introduced by the defendant explaining the character of the plaintiff's employment at the time he received his injury, or in assuming, as a matter of fact, that under such evidence the plaintiff was at said time employed in interstate commerce." (P. B. F. 1139.)

X.

The Supreme Court of the State of Minnesota erred in affirming the judgment of the District Court of Ramsey County, Minnesota, herein, which rightfully, according to law, should instead have been reversed because the said District Court of Ramsey County, Minnesota, had erred in denying defendant Illinois Central Railroad Company's motion for a new trial made upon the following ground:

"The court erred in charging the jury as follows: 'Now, under the law under which this case is being tried—the act of
531 congress—if you find from the evidence that the plaintiff was guilty of any negligence which contributed to his injury—this negligence will not defeat the plaintiff's right to a recovery, but under the act of congress, in assessing the plaintiff's damages, you must diminish the damages in the proportion as you find it to be, the defendant company's—that is, the carrier's—negligence, bore to the combined negligence of both the plaintiff and the defendant.'

Because in so charging the jury, the court erroneously construed the provisions of the so-called Federal Employers' Liability Act (Act of Congress, April 22, 1908, 35 Stat. 65) with respect to the matter of contributory negligence." (P. B. F. 1140, 1141.)

XI.

The Supreme Court of the State of Minnesota erred in affirming the judgment in favor of respondent Robert H. Peery.

For which errors, the appellant Illinois Central Railroad Company, a corporation, prays that the said judgment of the Supreme Court of Minnesota, dated February 15th, 1915, be reversed and a judgment rendered in favor of the appellant Illinois Central Railroad Company, and for costs.

Dated this 15th day of February, 1915.

ILLINOIS CENTRAL RAILROAD COMPANY,
By BUTLER & MITCHELL,
Its Attorneys.

532 STATE OF MINNESOTA:

Supreme Court, October Term, 1914.

ROBERT H. PEERY, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of the State of Minnesota in rendering judgment against it in the above entitled case, the appellant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignments of error herewith.

BUTLER & MITCHELL,
Attorneys for Appellant.

624 Endicott Building, St. Paul, Minnesota.

STATE OF MINNESOTA,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Illinois Central Railroad Company to Robert H. Peery in the sum of $12,000.00; such bond, when approved, to act as a supersedeas.

Dated February 15th, 1915.

CALVIN L. BROWN,
Chief Justice Supreme Court of Minnesota.

533 STATE OF MINNESOTA:

In Supreme Court, October Term, 1914.

ROBERT H. PEERY, Respondent and Defendant in Error,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation, Appellant and Plaintiff in Error.

Bond.

Know all men by these presents, that Illinois Central Railroad Company, a corporation organized under the laws of the State of Illinois, as principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto the above named Robert H. Peery in the sum of Twelve Thousand Dollars ($12,000) to the payment of which to the said Robert H. Peery, his heirs, executors, administrators or assigns, the said principal and surety jointly and severally bind themselves, their successors and assigns.

The condition of this obligation is such that, whereas the above named Illinois Central Railroad Company seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of Minnesota,

Now therefore, if the above named Illinois Central Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain
534 in full force and effect.

In testimony whereof, these presents have been duly executed by the respective parties hereto this 15 day of February, 1915.

ILLINOIS CENTRAL RAILROAD COMPANY,
By BUTLER & MITCHELL,
Its Attorneys,
Per GEORGE HOKE.
UNITED STATES FIDELITY & GUARANTY COMPANY,
By W. A. LANG, *Attorney in Fact.*

In Presence of—
JOHN G. BARWISE.
ETHEL LARSON.
EDITH COOKE.
GEO. W. ELLIOTT.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 15th day of February, 1915, before me personally appeared George Hoke, a member of the firm of Butler & Mitchell, attorneys for Illinois Central Railroad Company, appellant and plaintiff in error in the above entitled action, who, as one of the attorneys for said company, executed the foregoing instrument for and in behalf of said company, and acknowledged it to be the free act and deed of said company for the uses and purposes therein set forth.

[SEAL.] JOHN G. BARWISE,
Notary Public, Ramsey County, Minnesota.

My Commission expires Sept. 30, 1921.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 15th day of February, 1915, before me, a Notary Public within and for said County and State, personally appeared W. A. Lang, to me personally known, who being by me duly sworn upon oath did say that he is the Agent and Attorney-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed

to the foregoing within instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said W. A. Lang, did acknowledge that he executed the said instrument as the free act and deed of said Company.

[NOTARIAL SEAL.] EDITH M. COOKE,
Notary Public, Ramsey Co., Minn.

My Commission expires June 2, 1920.

Bond Approved and to act as a supersedeas.
Dated February 15th, 1915.

CALVIN L. BROWN,
Chief Justice Supreme Court of Minnesota.

(Endorsed:) Filed Feb. 15, 1915. I. A. Caswell, Clerk.

535 In the Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
ROBERT H. PEERY, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between the Illinois Central Railroad Company, a corporation, plaintiff in error and defendant, and Robert H. Peery, defendant in error and plaintiff, wherein was drawn into question the construction and effect of a certain statute of the United States commonly known as the Federal Employers' Liability Act (Act of Congress April 22nd, 1908, 35 Stat. 65), and the decision was against the right, privilege and immunity specially set up and claimed by plaintiff in error under and pursuant to said statute of the United States; a manifest error hath happened to the great damage of the said Illinois Central Railroad Company, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be *fully* corrected and full and speedy justice done to the par-
536 ties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United

States, together with this writ so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings *this day* being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States this 15th day of February, 1915.

[Seal U. S. Dist. Court, District of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk District Court of the United States,
District of Minnesota,
By MARGARET L. MULLANE,
Deputy Clerk.

Allowed Feb'y 15, 1915.

CALVIN L. BROWN,
Chief Justice Supreme Court of Minnesota.

537 *Certificate of Lodgment.*

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on the 15th day of February, 1915, in the case of Robert H. Peery, Respondent, vs. Illinois Central Railroad Company, Appellant;

1. The original bond, of which a copy is herein set forth;
2. Copies of writ of error, as herein set forth—one for defendant in error and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 1st day of March, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

538 In the Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
ROBERT H. PEERY, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Robert H. Peery, Esquire, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Minnesota, wherein Illinois Central Railroad Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of The Supreme Court of the State of Minnesota, this 15th day of February, 1915.

CALVIN L. BROWN,
Chief Justice Supreme Court of Minnesota.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota,
By V. C. PIDGEON, *Deputy.*

ST. PAUL, MINNESOTA, February 15, 1915.

I, the attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

SAMUEL A. ANDERSON.

539 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, in the city of St. Paul, Minnesota, this 1st day of March, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Costs of transcript $138.00, paid by the Illinois Central Railroad Company.

Endorsed on cover: File No. 24,603. Minnesota Supreme Court. Term No. 385. Illinois Central Railroad Company, plaintiff in error, vs. Robert H. Peery. Filed March 5th, 1915. File No. 24,603.

FILED
APR 20 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 385 77

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error.

vs.

ROBERT H. PEERY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

W. S. HORTON,
BLEWETT LEE,
Attorneys for Plaintiff in Error.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1915.

No. 385.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error.

vs.

ROBERT H. PEERY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

STATEMENT OF FACTS.

This is an action brought in Minnesota, under the Federal Employers Liability Act, for personal injuries suffered in the State of Kentucky, by a collision, December 8, 1911. There was a verdict for $12,000, subsequently reduced to $9,000, which, upon judgment rendered, was affirmed by the Supreme Court. It is another of the many suits prosecuted in St. Paul, notwithstanding the injury occurred in another state, of which the plaintiff was a citizen. The single question involved is, whether the defendant in error was engaged in interstate commerce at the time he was injured.

The complaint avers, in substance, the company's engagement in the operation of an interstate railroad

and between certain stations "in the State of Kentucky, known as Fulton and Paducah," and that

> "plaintiff, at the time of the accident and receiving of said injuries, was engaged in interstate commerce." (Rec., 1.)

It is further averred that on the 8th of December, 1911, plaintiff was in the employ of the defendant, as a freight conductor, engaged in the performance of his duties upon one of defendant's locomotive engines and trains then and there being run and operated "along and over its said interstate line of railroad *and from said Fulton to said Paducah, in the State of Kentucky*"; that while he was upon one of defendant's engines so being run in a northerly direction, a certain other engine of the defendant collided therewith.

There is no material controversy over the facts which explain the character of the employment. The plaintiff testified that he was a regular conductor, and that his principal run was on what is known as the Paducah and Fulton turn-around (Rec., 5), in which Paducah was both the starting and ending terminal (Rec., 11), though occasionally he had a run from Paducah to Dyersburg or Jackson, Tennessee. It is clear from his testimony that his crew took whatever southbound train there was to go from Paducah to Fulton, and then on the same day returned to Paducah with whatever northbound train or traffic was to be taken. He testified (Rec., 13):

> "Q. * * * First, when you went on the turn-around run that you have spoken about, what is the fact as to your being required generally to couple into and take trains back with you to Paducah or to intermediate stations?
>
> A. Well, we always take back a train or a portion of a train or a full train if there was that much there, and if not, whatever amount was there.
>
> Q. And it did happen at times that there was no train to take back or no cars?

A. Yes, sir.

Q. And what were you required to do when you had no cars to take back?

A. To go back with the caboose and engine.

Q. How frequently did it occur, to the best of your recollection, that you had no train for your engine to couple into and take back out of Fulton, north?

A. Well, there would be sometimes that it would go for a week or possibly two weeks that we had a train of cars; maybe then there would be a day or two that there would be as many as two or three or four cars that we would pick up—the engine and caboose and come back to Paducah and lay there without any cars at all."

Sometimes on the run from Fulton to Paducah his train handled cars locally between those and intermediate stations. (Rec., 35.) In both directions the same caboose and engine were used. (Rec., 14.)

On the day in question, he left Paducah, at 11:45 A. M., with a train of from fourteen to sixteen loaded coal cars (Rec., 8), some of which were going interstate, and arrived at Fulton at 3:15 in the afternoon. (Rec., 10.) There he left his train in what was called the new yard (also in Kentucky). (Rec., 7.) He then received instructions from the yardmaster to pick up a pile driver and outfit and an extra engine, No. 367, for the return trip. The train which he had in starting north from Fulton is described in the following from his testimony:

"Q. So that when you started back from Fulton to Paducah your train was made up of your engine and engine 367?

A. Yes, sir.

Q. And the pile driver outfit?

A. Yes, sir; pile driver outfit.

Q. And your caboose?

A. Yes, sir. * * *

Q. How many flat cars were there in addition

to the flat car upon which the pile driver was mounted?

A. As I remember now, there were three.

Q. Did you have anything else to take back?

A. No, sir." (Rec., 10-11.)

There is no evidence that the pile driver was moving in interstate commerce. On that point Peery testified:

"Q. Where did you pick up this pile driver outfit?

A. Picked it up at the new yard.

Q. The pile driver was picked up on the Kentucky side? Do you know who the pile driver belonged to?

A. It had the initials of I. C. on.

Q. Illinois Central, did you say?

A. Yes, sir.

Q. I don't suppose you know just where the pile driver came from when it came into Fulton?

A. No, sir; I do not." (Rec., 16-17.)

The extra engine, No. 367, which was part of the northbound train, had been in the switching service at Fulton, and, for some purpose not shown in the evidence, was to be taken to Paducah. Peery explained that engine and its use in the following:

"Q. Was that a road engine or a switch engine?

A. It was a road engine.

Q. Illinois Central?

A. Yes, sir.

Q. If you know, what was that being used for? Or had it been used for immediately before the 8th of December, up to that time?

A. Switching purposes in Fulton. * * *

Q. Anything wrong with it at this time?

A. There was something caused a great deal of steam to escape from the machine in some way. I don't know what it was.

Q. Did you know there at the time, what you were taking it back to Paducah for?

A. Yes, sir; I had a waybill of it.

Q. What was it going back for?

A. Billed to the Paducah shops." (Rec., 17-18.)

While he said the engine was billed to the Paducah shops, no explanation was made of the purpose in taking it there. On the trip it furnished part of the power for the train's movement. In short, it was then one engine of a double-header in the train of which Peery was conductor. He testified:

"Q. This engine, 367, was coupled up and working steam, wasn't it?

A. Why, I suppose so.

Q. In other words, 876 was not pulling 367 to Paducah?

A. Why, I suppose, if 367 was able to handle itself, it wouldn't be necessary.

Q. Yes, in other words, you might as well say that 367 was shoving the other engine, as to say that the other engine was pulling 367?

A. Why, 367 was able to handle its own weight.

Q. Yes, so you practically had a train that was a double-header, wasn't that it?

A. Well, in a sense, yes, sir." (Rec., 37.)

The train, so made up, left Fulton, northbound, about 5:15 in the afternoon. Its first stop was at Water Valley, where it was delayed nearly an hour in meeting other trains. (Rec., 18, 20.) The next stop was at Mayfield, twenty-two miles north of Fulton, *where the pile driver and outfit were left.* (Rec., 20.) The train was delayed there from thirty to thirty-five minutes. (Rec., 20.) From Mayfield north to the point of the accident—about fifteen miles—(Rec., 22), the train consisted only of a caboose and two engines, both of which were under steam. (Rec., 21.) There is no room for dispute over the character of the train at the time the plaintiff below was injured. It consisted of the caboose and two engines, neither of which had been, nor was, destined beyond the State of Kentucky.

There were two trains running on the same schedule or order north from Fulton, known as First and Second

No. 180. (Rec., 19.) Peery's train was the first section under that order. The speed was limited to fifteen miles an hour until the first section reached Mayfield, where the pile driving outfit was set out. (Rec., 19, 43-4.) There the speed limit was removed. When these trains so running under the same order reached a point about fifteen miles north of Mayfield, the second train ran into the rear of the first, under circumstances from which Peery contended that it was due to the negligence of the engineer on the second train, while the Company contended it was Peery's fault in not taking proper precautions at the particular place against the second section, which he knew was approaching.

He further testified that when the collision occured, he was sitting at a table in the caboose, finishing a delay report which he was required to submit when he delivered his train at Paducah. The report had nothing to do with the traffic which he carried, but was intended to explain the causes of delays where any such had occurred. In that connection, he said:

> "Q. What were you doing before this accident and up to the time of the accident as you were running along there?
>
> A. Why, at the time of the accident, I was making out my—doing my clerical work for this trip.
>
> Q. For what trip?
>
> A. For the finishing up the delay reports for the entire round trip.
>
> Q. When did you commence working upon your delay report for this round trip?
>
> A. Just after passing through Boaz.
>
> Q. And what is the delay report?
>
> A. It is a report that the company required us to make out giving the amount of delay in minutes or hours, also the cause of delay at any station or between stations." (Rec., 23.)

This report had nothing to do with the traffic which

he had carried southbound, the bills for which were left at Fulton. In that connection, he testified:

> "Q. Then you would not make them out partially, you wouldn't make them out as you went along?
>
> A. Oh, no; nothing except the wheel report and switch list—the wheel report of course going south and also the switch list had to be left at Fulton with the waybills so that the switch list was to be used by the switchman in breaking up the train." (Rec., 41.)

While the preparation of such a report hours after the delivery of the train at Fulton, even if the contents related thereto, is not in itself an act of transportation, yet there was no attempt to show that he was writing the part of the report which related to the southbound trip, or that there were any delays while going from Paducah to Fulton. He had testified to the delays on the trip from Fulton to the time of the accident, and, further, that when the collision occurred, he was "finishing" his report, so that there is nothing in the record to show that he was reporting delays which occurred while going to Fulton.

It was under such evidence, with the burden resting upon the plaintiff below to prove his service in interstate commerce, that the trial court held as a matter of law that he was employed in such commerce, and instructed the jury that if they found negligence on the part of the company's other employes, he was entitled to recover damages in accordance with the provisions of the Federal Employers' Liability Act. The court did not submit to the jury any issue touching the employment, but assumed the parties were engaged in interstate commerce, and instructed accordingly.

At the conclusion of the testimony, the defendant moved the court to direct the jury to return a verdict

for it, upon the ground that the plaintiff had failed to prove that at the time of the accident he was employed or engaged in interstate commerce. The motion was denied, and an exception taken. (Rec., 191-2.)

Upon the giving of the instruction assuming the application of the Federal Act, an exception was taken, though not required by the Minnesota state practice. (Sec. 7830, Gen. Stats. Minn. 1913; *Sassen* v. *Haegle,* 125 Minn., 441.) When the verdict was rendered, defendant, following the State practice, moved for a judgment, notwithstanding the verdict, or for a new trial, assigning the reasons set forth on pages 199 to 203 of the record, and especially including the objection that the evidence was not sufficient to justify a finding that the plaintiff, at the time of the accident, was either employed or engaged in interstate commerce; but that motion was denied after the plaintiff had consented to a reduction of the verdict to $9,000. (Rec., 260, 261.) Errors of the same character were assigned upon the appeal to the Supreme Court of the State (Rec., 264-7), where the judgment was affirmed, the court holding, as will appear from its opinion (Rec., 268-70), that the lower court properly determined as a matter of law that Peery was engaged in interstate commerce, and that the Federal Employers' Liability Act controlled the right of recovery.

Errors Relied Upon.

The errors now assigned are recited in full on pages 279 to 283 of the record. Their purpose is to raise the question whether, on the facts, defendant in error is entitled to recover under the Federal Act—whether the State Court properly assumed as a matter of law that defendant in error was employed in interstate commerce. The errors so assigned are:

(1) The Supreme Court of Minnesota erred in deciding that under the evidence Robert H. Peery, at the time of his injury, was employed by the Illinois Central Railroad Company in interstate commerce and entitled to the benefits of the Federal Employers' Liability Act.

(2) The Supreme Court erred in affirming the judgment of the District Court, instead of reversing it for its denial of the company's motion for a judgment, notwithstanding the verdict, upon the ground that the evidence wholly failed to establish that at the time of the happening of the accident the plaintiff was employed in interstate commerce, within the meaning of the said act.

(3) The Supreme Court erred in affirming the judgment of the District Court of Ramsey County, instead of reversing it because of its error in denying the company's motion for a new trial, upon the ground that the verdict was not justified by the evidence, because the evidence was not sufficient to justify a finding that the plaintiff, at the time of the happening of the accident, was employed in interstate commerce, within the meaning of the said act.

(4) The said Supreme Court erred in affirming the said judgment of the District Court, instead of reversing it because of its error in denying the company's motion for a new trial, upon the following grounds:

> "The court erred in charging the jury as follows: 'Now the answer in this case, gentlemen, admits the incorporation and general business of the defendant railroad company, and while it puts at issue the question whether the defendant was engaged at the time of the accident in carrying on what familiarly is called interstate commerce, this question as to its character has already been to the Supreme Court of this state upon an appeal heretofore taken upon certain questions raised here at a former trial and the Supreme Court has held, upon questions substantially as I understand the facts are here today,

that this defendant railroad company was in fact engaged in what is known as interstate commerce and that this plaintiff was, as its servant, engaged also in interstate commerce, and as I recall, counsel for the defendant in his address to the jury has said that there is substantially no difference between the facts in this case as they appear here upon this trial and the facts as they were passed upon by the Supreme Court of this state, and therefore it becomes my duty to say to you that so far as the law of this case is concerned, you will judge the plaintiff's case, and the defendant's also, by the act of Congress regulating what is known as interstate commerce, and the plaintiff—each party—is entitled to the rights and to the benefits conferred by that act.'

Because in so charging the jury, the court in effect instructed the jury that the rules of law embodied in the so-called Employers' Liability Act (Act of Congress, April 22, 1908, 35 Stat., 65) were applicable to this case, which was erroneous, because the evidence fails to establish that plaintiff was, at the time of the happening of the accident involved herein, either employed or engaged in interstate commerce within the meaning of the said Federal Employers' Liability Act.''

(5) The said Supreme Court erred in affirming the judgment of the District Court of Ramsey County, instead of reversing it because of its error in denying the Illinois Central Railroad Company's motion for a new trial, upon the ground that the court erred in its determining as a matter of law, instead of submitting to the jury for determination, the question whether plaintiff was, at the time of the happening of the accident involved herein employed or engaged in interstate commerce, within the meaning of the so-called Federal Employers' Liability Act; and in assuming in its instructions to the jury, as a matter of fact, that the plaintiff was employed in such commerce at the time of his injury.

(6) The said Supreme Court erred in affirming the judgment of the District Court of Ramsey County, instead of reversing it because of its error in denying the company's motion for a new trial, upon the ground that the verdict was contrary to the law, because the evidence wholly failed to establish that plaintiff was, at the time of the happening of the accident, either employed or engaged in interstate commerce within the meaning of the so-called Federal Employers' Liability Act.

(7) The said Supreme Court erred in affirming the said judgment of the District Court, instead of reversing it because of its error in denying the Illinois Central Railroad Company's motion for a new trial, upon the ground that it had erred in construing the Federal Employers' Liability Act as permitting the court, under the facts proven and stipulated, to decide as a matter of law that the plaintiff was at the time employed in interstate commerce, and to so instruct the jury as to permit a verdict for the plaintiff without finding that he was employed in such commerce at the time he was injured.

(8) The said Supreme Court erred in affirming the judgment in favor of the defendant in error.

(9) The said Supreme Court erred in construing the Federal Employers' Liability Act (Act of Congress, April 22, 1908) to apply to an employe of the defendant employed in the work being done by the plaintiff at the time of his injury.

The various assignments of error, though more in detail set out in the record, involve the questions whether the plaintiff, at the time of his injury, was employed in interstate commerce—whether the State Court properly assumed as a matter of law that he was so employed—whether the liability for this injury is to be determined by the said Federal Act.

BRIEF.

I.

IT IS MANIFEST THE STATE COURT ASSUMED THAT THE APPLICATION OF THE FEDERAL ACT DEPENDED ON THE EMPLOYES' USUAL EMPLOYMENT RATHER THAN HIS PARTICULAR EMPLOYMENT WHEN INJURED.

There were two trials in the State Courts. In the first, the trial court directed a verdict for the company, upon the ground that a case was not made under the Federal Employers' Liability Act. Upon an appeal by the plaintiff to the State Supreme Court, the judgment then rendered was reversed upon the theory that plaintiff's duties commonly related to interstate transportation.

Peery v. *Illinois Central R. R. Co.*, 123 Minn., 264 (143 N. W., 724).

The State Supreme Court, in that decision, cited such cases as *Pederson* v. *D. L. & W. R. R.*, 229 U. S., 146 (a suit for an injury received while the employe was carrying materials to repair a bridge regularly used in interstate commerce); and *St. L., S. F. & T. Ry.* v. *Seale*, 229 U. S., 156 (wherein the injury was received while a yard clerk was taking the records of the seals of a train carrying state and interstate commerce), and apparently failed to note the distinction between the application of the act to an injury received in the repair of a bridge regularly used in interstate commerce, though also used for state commerce, and its application to an injury received by one whose usual duties related to interstate commerce, but at the particular time was not so en-

gaged. Its error in that respect is manifest from the concluding sentence of the opinion, as follows (p. 269):

> "Plaintiff's general employment was in conducting a train engaged in interstate commerce, and he was not injured while engaged in some work purely of intrastate character."

It may be noted that in the plaintiff's brief upon the first appeal, one of the authorities relied upon (though not cited in the court's opinion) was the decision of the District Court, in *Behrens* v. *Illinois Central R. R.*, 192 Fed., 581, in which the doctrine, later declared erroneous by this court, was laid down that:

> "The usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which was wholly intrastate, fixes the status of the railroad, and the mere fact that the accident occurred while he was engaged in work on an intrastate train rather than a few minutes earlier or later when he might have been engaged on an interstate train, is immaterial."

It was in the period before this court had pointed out the distinction between the relevancy of the usual duties and of the particular service at the time of the injury to the application of the act that the first decision of the State Supreme Court was made. The case was sent back for a new trial, in which the lower court, following the rule thus declared, held that Peery was, at the time of his injury, engaged in interstate commerce, and that the Federal Statute applied.

When the case again reached the State Supreme Court, this court had, in *Illinois Central R. R.* v. *Behrens*, 233 U. S., 473, reversed the decision of the District Court, and held that Congress intended to confine its action to injuries occurring "when the particular service in which the employe is engaged is part of interstate commerce"; nevertheless, the State Court, having taken the ground,

not only in the first appeal, but later, in *Cousins* v. *Illinois Central R. R.*, 126 Minn., 172, that if part of the employe's duties related to interstate commerce, the Act applied, even though the injury was received while the particular service was of an intrastate character, affirmed the judgment for plaintiff.

Peery v. *Illinois Central R. R.*, 128 Minn., 119 (150 N. W., 382).

The principle which controlled its decision will be understood from the following quotation from the opinion (p. 269):

> "In *Cousins* v. *Illinois Central R. R.*, 126 Minn., 172; 148 N. W., 58, the *Behrens case* was considered in connection with the *Pederson case*, 229 U. S., 146, on which the decision of plaintiff's appeal was largely based, Mr. Justice Bunn saying (p. 175): 'Counsel for defendant correctly say that the decision in the *Pederson case* has apparently warranted the conclusion that the Federal Court would ultimately construe the Act of Congress as applicable to practically all employes of interstate railroads, except possibly those engaged in the work of new construction of instrumentalities as distinguished from repairs upon old instrumentalities. But they refer to the case of *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S., 473, decided by the Supreme Court, April 27, 1914, as indicating a less liberal construction of the Act. We do not see that the *Behrens case* is in point. The employe was at the time of the injury engaged in moving cars loaded wholly with intrastate freight from one part of the city to another, and it was held this was not a service in interstate commerce.'
>
> This court held that 'under the test laid down in the *Pederson case*, and approved in the *Behrens case*, namely, whether the work in question was a part of the interstate commerce in which the carrier was engaged, an employe of an interstate and intrastate carrier, who was wheeling coal for use in the company's shops, where cars were being repaired

> which had been and were used in interstate commerce, was within the protection of the Federal Act. We have considered the *Behrens case* in the light of counsel's argument, and finding nothing therein inconsistent with the views expressed in our former opinion, adhere thereto."

It is manifest that the State Court misconstrued this court's meaning in the *Pederson case*, and failed to note that employment upon a bridge over which interstate commerce is *regularly* transported is an employment in that commerce, even though the bridge is used for other purposes, while the wheeling of coal for heating purposes, or the running of a train carrying only state traffic, is not such an employment, even though other and the more usual duties of the same employe may be of that character. Its error is the more marked by its reliance upon the *Cousins case*, cited and followed in the opinion, which, however, was reversed by this court, in *Illinois Central R. R.* v. *Cousins*, 241 U. S., 641, February 21, 1916, upon the authority of *D. L. & W. R. R.* v. *Yurkonis*, 238 U. S., 439, and *Shanks* v. *D. L. & W.*, 239 U. S., 556.

II.

THE FEDERAL ACT DOES NOT APPLY TO PEERY'S INJURY, BECAUSE, AT THE TIME, HE WAS NOT EMPLOYED IN INTERSTATE COMMERCE.

While defendant in error was often—perhaps usually—employed in interstate transportation, that is not the test of the liability. He was not so engaged when his injury was received. He was then operating a train consisting of a caboose and two engines, between points within the State of Kentucky. He had on that day taken a train south from Paducah to Fulton (both within that state), and two hours later was ordered to take a train

from Fulton back to Paducah. His train northbound, in leaving Fulton, consisted of the caboose, two engines and a pile driver and outfit, occupying four flat cars. The pile driver and cars were picked up in the new yard at Fulton (in Kentucky) (Rec., 16-17), and remained in the train until it reached Mayfield, where they were set out. The train, north of that place, and at the time of the accident, consisted only of the caboose and two engines, neither of which was from or had been to a point without the state, nor was the train carrying any article from or destined beyond the state limits. Whatever may have been the character of the train of which Peery was the conductor, in going from Paducah south to Fulton, it is beyond controversy that on the trip northbound, and at the time of his injury, he was conductor of a train every part of which and all its contents were local to the State of Kentucky. The rule is, that whatever may be the usual or general employment, the application of the Federal Act depends upon the particular employment at the time an injury is received.

Illinois Central R. R. v. *Behrens,* 233 U. S., 473.

N. Y. C. & H. R. R. v. *Carr,* 238 U. S., 260.

Pennsylvania R R. v. *Knox* (C. C. A.), 218 Fed., 748.

Boyle v. *Pennsylvania R. R.* (C. C. A., 3d Ct.), 228 Fed., 266.

Erie R. R. v. *Van Buskirk* (C. C. A., 3d Ct.), 228 Fed., 489.

Gray v. *C. & N. W. Ry.,* 153 Wis., 637, 647; (142 N. W., 505).

La Casse v. *N. O. T. & M. R. R.,* 135 La., 129; (64 So., 1012).

Hench v. *Pennsylvania R. R.,* 91 Atl., 1056; (246 Pa., 1).

L. & N. R. R. v. *Strange's Admx.*, 156 Ky., 439; (161 S. W., 239).

Patry v. *C. & W. I. R. R.*, 265 Ill., 310; (106 N. E., 843).

A. T. & S. F. Ry. v. *Pitts* (Okla.), 145 Pac., 1148.

Alexander v. *Great Northern Ry.* (Mont.), 154 Pac., 914.

Knowles v. *N. Y. H. & H.*, 154 N. Y. S., 99.

McAuliffe v. *N. Y. C. & H. R. R.*, 164 App. Div. Sup. Ct. (N. Y.), 846.

C.B. & Q. R.R. Co. v. Harrington 241 U.S.

There is no substantial difference between the controlling facts in this case and those in *Illinois Central R. R.* v. *Behrens*, 233 U. S., 473, where it is distinctly announced that the particular service rather than the general employment is the test of the application of the Federal Act. There, as the court said (p. 476):

> "The general work of the crew consisted in moving cars from one point to another within the city over the company's tracks and other connecting tracks. Sometimes the cars were loaded, at other times empty, and at still other times some were loaded and others empty. When loaded the freight in them was at times destined from within to without the state or *vice versa*, at other times was moving only between points within the state, and at still other times was of both classes. * * * In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other. *At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state.*"

Yet, referring to the act in question, it was said (p. 478):

> "Giving to the words 'suffering injury while he

is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce. The act was so construed in *Pederson* v. *Delaware, Lackawanna & Western Railroad Co.*, 229 U. S., 146. It was there said (p. 150): 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employe is employed by the carrier in such commerce.' Again (p. 152): 'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?' And a like view is shown in other cases. * * *

Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. *That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.*"

Peery, on the southbound trip, had been engaged in the transportation of interstate traffic, but at the time of his injury he was a conductor of a train which consisted of a caboose and two engines moving between two points within the state. He was not even going to Paducah to engage in interstate commerce, but to the place where he would lay off until called for further duty. (Rec., 11.) He had carried interstate freight south, as part of his run, but his connection with it ended at Fulton, and from there north he handled whatever traffic was to be carried. When injured, he was employed upon a train no part of which had been or was destined without the State of Kentucky. Under these circum-

stances, there can be no substantial distinction in the application of the Federal Act from that which controlled in the decision of the *Behrens case.*

The rule applied in the *Behrens case* is well illustrated by the distinction drawn between it and the rule applicable in *N. Y. C. & H. R. R.* v. *Carr,* 238 U. S., 260, where the employe was injured while setting out from an interstate train two cars loaded with intrastate commerce. The court said (p. 263):

> "In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate train and proceed with it, with Carr and the other interstate employes, on its interstate journey.
>
> The case is entirely different from that of *Illinois Central R. R.* v. *Behrens,* 233 U. S., 473, for there the train of empty cars was running between two points in the same state. *The fact that they might soon thereafter be used in interstate business did not affect their intrastate status at the time of the injury;* for, if the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles the effect would be to give every car on the line that character. Each case must be decided in the light of the particular facts with a view of determining *whether, at the time of the injury,* the employe is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

But here a train carrying no traffic was running between two points in the same state. The fact that in the forenoon of that day the crew had handled southbound interstate freight did not affect "their intrastate status at the time of the injury." They were then handling a northbound train carrying no interstate traffic.

While in no degree here controlling, the other cases above cited so well illustrate not only the line beyond which the Federal Act has no application, but the understanding had of this court's decision in the *Behrens case,* that brief extracts therefrom are given.

In *Pennsylvania R. R.* v. *Knox* (C. C. A.), 218 Fed., 748, a freight brakeman was killed while switching cars which had been used in interstate commerce, but at the particular time were in the yards awaiting demand for their use. It appeared that for part of the day the employment was in interstate commerce, but not at the time of the injury. The court said (p. 751):

> "But it is also certain that a particular interstate movement must come to an end and that the act may cease to apply when the movement ceases."

And, further (p. 752):

> "When, indeed, it may be asked, would such cars lose their interstate character, if they had not lost it under the facts before us? It is difficult to see what other satisfactory test can be applied, for it is clear that they could not remain interstate cars indefinitely. They might have been sent to the repair shop at the first halting place, or have actually been used there to carry freight between Pennsylvania points, and in either event it could not be denied that their interstate character had ceased."

In *Boyle* v. *Pennsylvania R. R.* (C. C. A. 3d Ct.), 228 Fed., 266, the plaintiff's intestate was injured while waiting to inspect the southbound of two trains moving in opposite directions between Philadelphia and Pottsville, Pennsylvania. The court, having quoted from the *Behrens case,* said that (p. 271):

> "Therefore, the kind of commerce in which the cars were being used at the time Boyle was at work upon them, determines whether Boyle's employment was intrastate or interstate in character. Boyle's employment was similar to that of Behrens at the time of his injury, with similar disregard to

the possible interstate character of the commerce in which the train, as an instrumentality, might subsequently be used."

And, having pointed out the various claims and contentions, concluded (p. 273):

"Therefore, whether the trains involved in this suit were engaged in transporting passengers in interstate commerce, depends not upon the advertisement or upon the fact that connections may be made at West Philadelphia, 'when occasion required,' that is, when passengers desire, but upon the actual character of the transportation in which such trains are engaged at a given time. We are therefore back to the first question, which relates to the character of the commerce in which the train was engaged and the intestate was employed at the time of his injury, controlled by the evidence that the train moved between interior points in one state, and that it was transporting no passengers or baggage into another state. From this test or standard, presented by the trial judge, it must be decided that it was not engaged in interstate commerce, and those participating in its movements were not employed in that commerce."

In *Erie R. R.* v. *Van Buskirk* (C. C. A., 3d Ct.), 228 Fed., 489, plaintiff's intestate was an engine hostler in a railway yard. He left his engine where he was employed in interstate commerce to assist a machinist to remove the yoke from a clam shell bucket used in lifting coal from a coal car to the tenders of standing engines. The court, in its opinion, assumes that while hostling the engine, *Van Buskirk* was employed in interstate commerce, but that the work of removing the yoke was not an act of such commerce. It concluded (p. 492):

"From these facts and proofs it is clear that the bucket from which Krueger was taking the yoke was not in actual or contemplated interstate commerce use, that Kreuger in attempting to remove such yoke was not employed in interstate commerce, and that the Brown hoist which he enlisted to help move

> the bucket was not, while so employed, an instrumentality used in interstate commerce. Such being the case, it follows that Maloney and Van Buskirk were not engaged in assisting Kreuger in interstate commerce when the unfortunate accident occurred. It follows, therefore, that all the persons and all the agencies connected with this accident were so distinctively noninterstate commerce in character that it was the duty of the court below on trial, and of this court now on appeal, to hold, under the undisputed facts, that as a matter of law the decedent was not engaged in interstate commerce when he was killed and that therefore the Federal Employers' Liability Act, which imposes 'damages to any person suffering injury while he is employed * * * in such commerce,' does not apply in this case."

In *Gray* v. *C. & N. W. Ry.*, 153 Wis., 637 (142 N. W., 505), the employe was a hostler, whose duties included the dispatching of engines, some for interstate and others for intrastate service. At the time of his injury, he was walking back to his rest shanty. It was held that his claim was not covered by the Federal Act, the court saying (p. 647):

> "It appears that the plaintiff at the time of the accident here was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. Now it may perhaps be correctly held (though we do not decide the question) that a man whose day is spent in dispatching engines all of which are engaged in interstate commerce is in legal effect employed in interstate commerce during the whole day and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; but if, on the other hand, part of the engines dispatched be engaged in interstate business and part in local or intrastate business, we are unable to see how it could be logically said that he was 'employed in interstate commerce' all day or during his intervals of leisure."

The last case was before this court, in *Chicago & North Western Ry. Co.* v. *Gray*, 237 U. S., 339, but no

opinion was expressed touching the character of the employment.

In *La Casse* v. *N. O. T. & M. R. R.*, 135 La., 129 (64 So., 1012), the duties consisted in receiving locomotives that came to the roundhouse, taking care of them, and having them filled with water and steamed up. While the employe was steaming up an oil-burning locomotive, the crown sheet gave way and the injury resulted. The court said:

> "We do not understand this evidence to mean any more than that this locomotive, like any other locomotive of the defendant company, or any of its cars, might be and was sometimes used in interstate commerce. Not that it was being so used at the time the decedent was attending to it. On the contrary, the evidence shows that its last run, which was on the preceding day, had been from another intrastate point to Eunice. If the fact that a locomotive or a car might be used the next day, or whenever next needed, in interstate commerce, were equivalent to being actually at the time in use in that commerce, the effect would be that whenever a railroad did not confine itself to intrastate commerce, but engaged also in interstate commerce, every one of its employes would at all times be engaged in interstate commerce when at their work."

In *L. & N. R. R.* v. *Strange's Admx.*, 156 Ky., 439 (161 S. W., 239), the injury occurred while the employe was handling a train containing empty coal cars billed between two points in Kentucky. Some of the cars had come from Tennessee, but new orders for their destination having been received at Russellville, the court construed the movement as between two state points, saying (p. 448):

> "What are the facts of this case? The train on which decedent was working consisted of 19 cars. The majority of those cars were brought from points in Kentucky to Russellville. A few of the cars were

brought from points in Tennessee. The conductor was directed to bring all of the cars to Russellville. No one had orders to carry the cars any farther. When the cars coming from Tennessee reached Russellville it was the end of their interstate journey. After reaching their destination new orders were issued with reference to their destination. Under these new orders and on their new journey each car in the train was destined to a point within the State of Kentucky. It is apparent, therefore, that the carrier was not engaged, nor was the decedent employed, in interstate commerce at the time of the injuries resulting in his death. It follows, therefore, that the trial court properly held that the case was one arising under the state law, and not under the Federal statute."

While, under *C. R. I. & P. Ry.* v. *Wright,* 239 U. S., 548, the court may have been in error in assuming the movement was intrastate as applied to the cars from Tennessee, yet the principles announced correctly apply to the present employment and train, no part of which was interstate commerce.

In *Hench* v. *Pennsylvania R. R.,* 91 Atl., 1056 (246 Pa. St. 1), it was held the burden was on the plaintiff to prove an engagement in interstate commerce at the time the injury was received, and, referring to the *Mondou, Pederson,* and other cases in this court, it was said (p. 1058):

"We must assume, however, that it was not the intention of these decisions to construe the Acts of Congress so as to make them cover injuries sustained by an employe engaged in intrastate commerce at the time he was injured. Certainly the Acts of Congress could not apply to a railroad, or its employes, engaged exclusively in intrastate commerce and not having any business of an interstate character. * * * If the mere fact that a railroad may be used at times, frequently or otherwise, for interstate commerce transportation, fixes the status of all its employes as being engaged in

interstate commerce within the meaning of the Acts of Congress, without reference to the duties they were performing at the time of the injury, it would follow that all such employes, no matter how incidentally or remotely their duties had to do with interstate commerce generally, or what kind of commerce they were engaged in when injured, would come within the purview of the Federal statutes when they brought an action to recover damages for personal injuries. To so hold would mean the wiping out of all state regulation and authority in matters relating to the personal injuries of railroad employes. The cases have not gone so far, and we do not see how the rule can be laid down so broadly without doing violence to the plain language of the commerce clause of the Constitution which limits the Federal power to interstate subjects."

In that case, the proof did not show the character of the cars which the employe was switching at the time of his injury. It was held a case was not made under the Federal Act. Robbins v Gray 241 U.S. 16, 21 (1916) a

In *Patry* v. *C. & W. I. R. R.*, 265 Ill., 310, a switchman, whose duties included the handling of both interstate and intrastate passenger cars at a terminal station, was injured while handling cars none of which were operated in anything except intrastate commerce. The court said (p. 311):

"It is not necessary to state the facts at length. They may be found in the opinion of the Appellate Court. (185 Ill. App., 361.) Since the filing of that opinion the Supreme Court of the United States has decided, in the case of *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S., 473, that the provisions of the Federal Employers' Liability Act are limited to injuries occurring while the particular service in which the employe was engaged was a part of interstate commerce. It is conceded that the particular service in which the plaintiff was engaged at the time of his injury was not interstate commerce within this decision, and therefore no liability existed under that act."

In *A., T. & S. F. Ry. Co.* v. *Pitts* (Okla.), 145 Pac., 1148, the injury was to a brakeman on a train which ran each day from Tonkawa to Ponca City via Blackwell (Oklahoma), and returned thence to Blackwell, where it did yard switching in the afternoon. The injury occurred while switching was being done at Blackwell. The court quoted from the *Behrens case*, and said (p. 1149):

> "The only and undisputed evidence in the present case tends to show that at the time of the plaintiff's injuries the 'particular service' in which both parties to this action were engaged was intrastate, and not interstate, commerce, while the burden was upon plaintiff to show that defendant was liable under the Federal Act if he desired to claim liability thereunder; and it follows that this case does not fall within the purview of the Act of Congress of April 22, 1908."

In *Alexander* v. *Great Northern Ry. Co.* (Mont.), 154 Pac., 914, a conductor was killed as the result of the derailment of the caboose of his train. Decedent was killed while in charge of a work train. His particular duty at the time was to load ties from various places along a branch line, where they had been left by the persons who cut them, and to take the cars so loaded to Kalispell, where they would be taken by other trains to the defendant's tie-treating plant, after which they would be sent to various points, as might be required for construction, renewal or repairs. The court said (p. 916):

> "No case has been called to our attention which in its facts closely resembles the one at bar; but in *Illinois Central Ry.* v. *Behrens*, 233 U. S., 473, it was held that employment in interstate commerce was not shown where the fireman of a switch engine operating within the City of New Orleans was killed while moving cars loaded with intrastate freight, notwithstanding that his general duties had to do with cars of all classes, often commingling those loaded with interstate freight and those empty or loaded with freight of an intrastate character, or

> rapidly passing from one class to the other. Accepting this as authoritative, we are impelled to the view that the decedent was not at the time of his death employed in interstate commerce, and therefore the action was not sustained under the Federal Employers' Liability Act."

In *Knowles* v. *N. Y. H. & H.*, 154 N. Y. S., 99, the decedent, a switchman, regularly assigned to a switch locomotive in defendant's yard, was killed while crossing the tracks in the yard on his way to work. It was held that to establish liability under the Federal Act, it must be proven that when killed he was engaged in interstate commerce, in the sense that the work which he was on his way to do was of that character, which could be done by proving that the switch engine on which he was employed was exclusively engaged in interstate commerce or that it was thus used at the very outset of the employment. The proof showed that the engine was used in handling both state and interstate commerce, but the character of the work done in the first movement was not shown. It was held there could be no recovery.

There are other similar decisions by State Courts, but the foregoing suffice to illustrate the recognized limit of the application of the Federal statute and the lack of support for the decision of the Minnesota Supreme Court. Whatever of variance there may be in the details of some of the cited cases, they leave no room for controversy over a case like the present, where no part of the train's equipment came from, or was destined to, another state, and no interstate traffic was being transported. Peery was employed as a conductor on trains run south from Paducah to Fulton and equally on trains operated north from Fulton to Paducah. Frequently, trains in both directions carried interstate traffic; but upon the particular day, he was running a train

engaged in purely local transportation between two points within the State of Kentucky. Whatever he did on the southbound trip, or whatever he might have done on the following day, has no bearing. This court, in the *Behrens case*, said:

> "That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

This is not the case of an employe going to a designated point to engage in interstate commerce, as in *Lamphere* v. *Oregon R. & N. Co.*, 196 Fed., 336, nor the case of a man returning to his home terminal from the performance of an act of interstate commerce, but a case wherein, at the time the injury was received, the employe was engaged in the performance of one of his regular duties, which then was the running of a train between two points local to the State of Kentucky, carrying no interstate commerce.

III.

THERE ARE NO FACTS GIVING AN INTERSTATE CHARACTER TO THE PARTICULAR EMPLOYMENT.

The record is conclusive that when Peery was injured he was engaged in the particular service of operating a strictly intrastate train between Fulton and Paducah; yet before the State Court the attempt was made, and possibly will be here, to distinguish this case by the claim that an extra engine was being taken to the shops at Paducah, and that Peery, at the time of the collision, was doing some "clerical work" relating to the round trip. The opinion of the State Court shows that no

weight was given to either of those claims, and rightly so, because, first, neither such act related to interstate commerce, under the evidence; and, second, construed most favorably for defendant in error, his work in that respect had no direct or substantial connection with interstate commerce.

The extra engine started from the roundhouse in Fulton (Rec., 10); it moved under its own steam, so that the train was in effect a double-header (Rec., 37); it was billed to the Paducah shops; it had been used for switching purposes in the Fulton yards. (Rec., 17.) There is absolutely nothing to show the purpose of its movement from Fulton to Paducah at the particular time. Peery, in answer to the question whether anything was wrong with it, said that there was "something that caused a great deal of steam to escape from the machine in some way, I don't know what it was"; but there can be no pretense that, even if material, this record shows the engine was going to the shops to be repaired for use in interstate or any other kind of commerce. It may have been intended for use in those yards, or to be scrapped, or sold, or for any of the great number of uses to which a locomotive can be put.

The "clerical work" mentioned consisted of making out the delay report which he said must be handed in at the end of the round trip. While its details are not explained, it may be assumed that it consisted of such entries as "meeting train," "hot box," "draw-bar pulled out," or some other like entry. He had been working upon it from seven to ten minutes before the collision. (Rec., 49.) He testified that at the time of the accident he was "finishing" the report. His testimony was (Rec., 23):

"Q. What were you doing before this accident

and up to the time of the accident as you were running along there?

A. Why, at the time of the accident I was making out my—doing my clerical work for this trip?

Q. For what trip?

A. For the *finishing up* the delay reports for the entire round trip."

Even if it can be seriously pretended that the making of such a report several hours after the completion of a southbound trip in which interstate commerce was carried would in itself be an act of such commerce, there is nothing in this record showing that at the time of his injury he was recording delays which occurred upon that trip. He said he was "finishing" the delay report, and the only delays mentioned in this record occurred at Water Valley and Mayfield, on the northbound trip. A claim that he was making a record of anything that occurred on the southbound trip is unwarranted by the testimony.

But it has been settled by this court that the act claimed to distinguish the service as interstate in character must be so directly and immediately connected with interstate transportation as substantially to form a part or necessary incident thereof.

N. Y. C. & H. R. R. v. *Carr,* 238 U. S., 260.
St. L., S. F. & T. Ry. v. *Seale,* 229 U. S., 156.
Pederson v. *D., L. & W. R. R.,* 229 U. S., 146.
D., L. & W. R. R. v. *Yurkonis,* 238 U S., 439.
Shanks v. *D., L. & W. R. R.,* 239 U. S., 556.
Illinois Central R. R. v. *Cousins,* 240 U. S., 641.

In *Shanks* v. *D., L. & W. R. R.,* 239 U. S., 556, it is said:

"The true test of employment in such commerce in the sense intended is, was the employe at the

time of the injury engaged *in interstate transportation or in work so closely related to it as to be practically a part of it?"*

So far as the engine 367 is concerned, Peery's sole connection with it was in being conductor of a train of which it was part of the motive power, between two state points. With its future he had no connection or duty. On the particular occasion, it was no more nor less than an engine on his train. With its repairs, if any to be made, and even if that would be an act of interstate commerce, Peery had nothing to do. He was to see that it was properly run between designated stations, and at Paducah his connection with it ceased. Even if repairing is an act of interstate commerce, he was not to repair it, nor did he know that any such work was to be done.

Again, if there had been proof that the delay report noted any incident of the southbound movement, or that at the very moment of the collision he was entering therein a delay which then occurred, could it be said that the notation of such a fact relating to another train—at another time—would suffice in itself to change the whole character of his then employment—from that of the conductor of a purely local train, which was his particular responsibility at the time, to that of an interstate transportation, which in fact had been completed six hours before? Surely, it cannot be contended that making the report of a delay which occurred while the plaintiff was engaged in interstate commerce, but long after its completion, is a necessary part of that transportation. The delay had ended, the train had reached its southern destination; its transportation was completed; the report which, according to him, might have been made when Peery reached Paducah, could not, and did not, change anything that had occurred, nor did it

affect the movement of the traffic which had been carried. It was not like a waybill or other similar document which accompanies and affects the traffic itself. As well might it be said that when Gibbons wrote his "Decline and Fall of the Roman Empire," he was engaging in the great event which he narrated.

But it suffices to say that there is no proof that there was any delay in the southbound movement; that the report contained a reference thereto, or that Peery was doing anything more than explaining the delays at West Liberty and Mayfield, which occurred on the northbound trip. If the plaintiff wished to make a point upon that report, the burden was upon him to at least show that he was engaged in reporting the southbound movement when the accident occurred.

We do not comment on the handling of the pile driver and outfit, because they had been taken from the train at Mayfield, long before the accident occurred.

IV.

THE APPLICATION OF THE FEDERAL ACT WAS PREJUDICIAL TO THE PLAINTIFF IN ERROR.

While, in a case of this character, in which the complaint or declaration charges that both plaintiff and the defendant were employed in interstate commerce at the time of the injury and a liability throughout is asserted upon the basis of the Federal Act, a recovery upon some other theory is not consistent with the issues and the judgment for the plaintiff must be reversed where the proof does not sustain the pleading; yet it is manifest that to hold this case within the liabilities of the Federal statute prejudiced the plaintiff in error. One of the issues in this case is whether Peery was not guilty of negli-

gence in failing to throw out a fusee, or take other proper precautions against the approach of the second train or section—a defense permitted to the full extent by the laws of Kentucky, but not by the Federal Act.

It is averred in the complaint, in addition to the charge that the injury was received while the plaintiff was engaged in interstate commerce, that:

> "Said collision and injuries were caused through the carelessness of the defendant and its servants and agents in charge of said other engine; that under and pursuant to the common law of the State of Kentucky, the defendant was liable and responsible for the negligent acts of the employes in charge of said other engine."

No proof was made touching the laws of Kentucky, and this court will not assume that the liabilities under the laws of Kentucky are other than as made by the common law.

> *Eastern Building, &c., Asso.* v. *Williamson,* 189 U. S., 122.

And if the Federal Employers' Liability Act does not apply, the defendant would have been entitled to the defenses of contributory negligence and the assumption of the risk of the negligence of a co-servant, as such defenses have been recognized and sustained by this court.

> *Northern Pacific Ry.* v. *Hambly,* 154 U. S., 349.
> *B. & O. R. R.* v. *Baugh,* 149 U. S., 368.
> *Oakes* v. *Mase,* 165 U. S., 363.
> *New England R. R.* v. *Conroy,* 175 U. S., 323.

And especially should such decisions control where the pleading avers, as above quoted, an existence of the common law in the State of Kentucky.

Furthermore, while this court, in a case arising in Minnesota, may not take notice of the laws of Kentucky,

the fact is, that in that state the common law defenses prevail.

Wiley v. *C. N. O. & T. P. R. R.*, 161 Ky., 305.
L. & N. R. R. v. *Hocker*, 111 Ky., 707.

It is therefore submitted that the judgment of the State Court should be reversed.

Respectfully,

W. S. Horton,
Blewett Lee,
Attorneys for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 385.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

ROBERT H. PEERY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This is an action based upon the Federal Employer's Liability Act and brought to recover damages for personal injuries suffered by the defendant in error in the state of Kentucky, on the 8th day of December, 1911. Final judgment was entered in favor of the defendant in error. Thereupon a writ of error was sued out by the plaintiff in error and the case brought to this Court for review. The only question involved is as to whether or not the defendant in error was injured while employed in interstate commerce work.

It is alleged and admitted that the plaintiff in error is a common carrier by railroad, owning and operating interstate lines of railroad extending into and through the states of Tennessee, Kentucky, Illinois and other states, including the line in question. The only two lines of railroad extending into and through Fulton, Kentucky, are owned and operated by the plaintiff in error, one extending from Chicago, Illinois, to New Orleans, Louisiana, and the other from Louisville, Kentucky, into and through the state of Tennessee (Record Page 6). Paducah is located at the northerly line of Kentucky on the Ohio River, Illinois being across the river (Record Page 6). Fulton is partly in Kentucky and partly in Tennessee, and is a city of about 4,000 inhabitants (Record Page 7). While the main yard in Fulton is located in Kentucky, nevertheless, some of the tracks extend over into Tennessee (Record Pages 7, 16). Interstate trains ran into and out of Fulton from the north and south both day and night in large numbers (Record Page 8).

The defendant in error had had this turn-around run as his regular trip as freight conductor for three or four years immediately prior to the time of the accident (Record Page 5). During this time he never handled a train out of Paducah to Fulton, which was not interstate in character (Record Page 13). He made this trip out of Paducah every day (Record Page 13, 14, 35). Paducah was always his starting and ending terminal on this Paducah-Fulton turn-around run (Record Page 11). He always took his interstate train to Fulton *and was always required to bring his engine, caboose and crew at once back to Paducah, his starting point, and that, too, regardless of whether or not any cars were to be brought back*

in connection with this movement (Record Pages 5, 11, 12, 13, 14, 23, 25). His mileage, upon which his compensation was based, was continuous from Paducah to Paducah, via Fulton, one hundred miles in extent (Record Page 14). He always made and was always required to make a written report, known as a delay report, for this trip as one continuous trip from Paducah to Paducah, it being his custom to begin making out of such report at a point on the return far enough away from Paducah so as to enable him to complete it by the time he had reached Paducah (Record Pages 23, 41, 44).

Cars or trains brought into Fulton from the north by the turn-around crews were taken up and carried south by other crews coming into Fulton from the south, and cars and trains brought into Fulton from the south were carried north by the turn-around crews from the north. Cars and trains coming into Fulton from the south and destined to be carried on north were generally placed in what is spoken of as the new yard at Fulton (Record Pages 15, 16). Cars and trains also coming from Cairo and Mound, Illinois, would be placed in the new yard (Record Page 17). There were other tracks at Fulton and belonging to the plaintiff in error and known as the elevator track, C. & O. passing track, the back track, and the Y and house tracks, some of which were located entirely in Tennessee, and the others partly in one state and partly in the other.

The pile driver outfit, consisting of one car, loaded with the pile driver and probably a ditcher, and three cars loaded with equipment, were found by the defendant in error in the new yard (Record Page 16). This outfit belonged to the plaintiff in error and was constructed and

designed for the purpose of keeping in condition the plaintiff in error's bridges and trestles (Record Page 17). It was billed and was being taken by the defendant in error to Mayfield for the purpose of using the same at that place to drive piles and to repair one of plaintiff in error's tracks, known as the "Mills Spur," and connected with the main line. After being taken to this place, it was so used (Record Pages 142, 143). Where this outfit had come from prior to being placed in the new yard to be transported to Mayfield does not appear directly in the record. It appears only from the fact that cars and trains coming from the south were placed in the new yard and cars and trains coming from Mound and Cairo, Illinois, were placed in the new yard.

The crippled engine, which defendant in error was taking back to the Paducah shops for repair, was also one of plaintiff in error's engines, which had been in continuous use as a switch engine for some months in the Fulton yards (Record Page 17). This engine was billed to the Paducah repair shops (Record Pages 18, 36, 42). It was coupled to the defendant in error's engine and between his engine and the caboose, and was being hauled by the defendant as conductor, at the time the accident occurred. This crippled engine was working steam and probably enough to propel itself. But the defendant in error was required to go to the round house to get the engine, which he did, and had the bill for the engine to the Paducah shops (Record Pages 10, 19 and 36).

The defendant in error was in his caboose and engaged in the work of making up his delay report for the entire trip from Paducah to Paducah, when the accident occurred. He commenced this work after leaving Boaz, and

was injured between that and the next station (Record Pages 23, 22).

Hence it appears, and without any attempt to dispute these facts, that only two roads ran into and through Fulton, both running north and south and both interstate in character, one being the road from Paducah to and through Fulton to the south; that the defendant in error had been regularly operating only interstate trains and daily from Paducah to Fulton, the same being carried on south from Fulton by other crews; that he had the same kind of a train on the day in question; that it was his duty, after leaving his train in the yards at Fulton, to return at once to Paducah, his starting and terminal point, with his engine, caboose and crew, *regardless of whether or not he was to take any cars back on his return;* that Paducah was the end of his run on this trip; that his return to Paducah was not only for the purpose of getting back to Paducah, his starting point, after delivering his interstate train at Fulton, but to be at Paducah with his engine, caboose and crew and ready, after taking the usual rest, which was always taken at Paducah, to take out his regular interstate train on the following day; that frequently, but not always, there were cars or trains at Fulton which had come in from the south or from Cairo and Mound, Illinois, which he was required on his return to take back to Paducah or to intermediate points; that he always was allowed compensation based upon mileage from Paducah to Paducah via Fulton as one continuous trip, and that he always made out his delay report for such trip as one continuous trip, making out such delay report upon the return to Paducah and not upon the journey from Paducah to Fulton; that he and his engine and ca-

boose and crew were never assigned to the duty of handling any local cars or trains out of Fulton, independent of his return to Paducah, but always in connection with such return trip; that cars and trains were being carried into the new yard from the south and from Cairo and Mound, Illinois, and that the defendant in error and other turn-around crews would take these cars and trains on their further journey to the north, such trains generally consisting of solid trains of empty coal cars of the character of cars which the same crews carried south when loaded with coal, and, again, the trains thus taken north would be mixed trains of empty coal cars and loaded cars of lumber, and sometimes there would be cars loaded with bananas and other merchandise (Record Pages 14, 15, 16); that, on the day in question, he was required to and did couple to his engine and take with him on his return to Mayfield the pile driver outfit, and coupled to and took with him on his return to Paducah a crippled engine billed to the repair shops at Paducah; that the pile driver outfit was owned by the plaintiff in error, and was constructed and designed for the purpose of keeping and maintaining its bridges and trestles in repair; that the engine was one which had been used continuously for several months in the yards at Fulton for the purpose of switching and handling these interstate trains coming in from the south and the north; that, at the time the accident occurred, and in the usual and customary manner and place, he was making up his delay report covering his trip from Paducah to Paducah via Fulton; that there is nothing in the record to disclose or to indicate other than that the pile driver outfit had come into Fulton from some point outside of the state of Kentucky, and that the defendant in

error was simply completing its transportation to Mayfield; that it was being taken to Mayfield to be used for the purpose of repairing a track belonging to the plaintiff in error; that it was so used; and that the engine was being taken to Paducah to the repair shops for the purpose of being repaired and placed in fit condition for further use

ARGUMENT AND AUTHORITIES.

DEFENDANT IN ERROR WAS INJURED WHILE EMPLOYED IN INTERSTATE COMMERCE.

He had been freight conductor continuously on the run in question for about three or four years. Every train he took out of Paducah to Fulton was interstate, taking one out every twenty-four hours (Record Pages 13, 14, 35). *He was always required to bring back to Paducah from Fulton his engine, caboose and crew at once, and that, too, without reference to whether or not there was any train at Fulton ready to be taken north.* His run was from Paducah to Paducah via Fulton. He was paid for the entire trip beginning and ending at Paducah, the allowance being for one hundred miles. It nowhere appears that he returned from Fulton to Paducah solely for the purpose of moving a north-bound train. *The two primary purposes for returning were, first, to have his engine, caboose and crew returned to Paducah, the starting point, after delivering his interstate train at Fulton, and, second, for the purpose of having the same in Paducah so as to be ready to take out his regular interstate train on the following day.* Frequently, though not always, he was ordered to take with him cars or a train. But he never ran from Fulton to Paducah solely for the purpose of moving a north-bound train. In determining the character of his employment while returning to Paducah, it will not do to treat such return as being made simply for the purpose of carrying cars or trains out of Fulton. The character of his employment must be determined with reference to all the purposes. Unquestiona-

bly, he would still be possessed of the attributes of an interstate servant, while returning to Paducah from Fulton, after delivering his interstate train at Fulton, if he was simply running his engine and caboose without cars and solely with the object in view of getting back to Paducah. That act clearly would be a part of the whole act of moving an interstate train from Paducah to Fulton. Had he, his engine, caboose and crew been ordered, after reaching Fulton, to engage in the work of moving or handling purely intrastate cars as a separate and distinct act, having no relation to or connection with his return to Paducah, then, and while so being employed, he would be in the same class of employes as any other intrastate servants. But the record does not disclose any such situation. The character of his employment upon his return, keeping in mind the purposes of the run, cannot be said to have been any different from what it would have been had he been ordered in the first instance to take his engine, caboose and crew to Paducah for the express purpose of coupling to and hauling from Paducah a waiting interstate train. Without doubt, in the latter instance, he would have been employed in interstate commerce.

Pedersen v. Delaware etc. R. R. Co., 229 U. S. 146.
St. Louis etc. Ry. Co. v. Seale, 229 U. S. 156.
North Carolina R. R. Co. v. Zachary, 232 U. S. 248.
Horton v. Oregon etc. Co., 130 Pac. Rep. 897.
Lamphere v. Oregon etc. Ry. Co., 196 Fed. 336.
Erie R. Co. v. Jacobus, 221 Fed. 335.
New York Central R. Co. v. Carr, 238 U. S. 260.

What difference in principle can there be, where it appears as in the case at bar, that he was returning to the initial starting point and in the usual and customary man-

ner, after delivering his interstate train at Fulton. In other words, there can be no difference in the character of the employment, where he is going to a distant point for the purpose of taking out an interstate train, and where he is returning to the initial point after delivering an interstate train. But, not only was he returning to the initial point after so delivering his train, but he was returning so that he and his caboose and crew, after taking their usual rest, would be ready to take out the regular interstate train on the following day. He cannot be said to have lost his attribute as an interstate servant simply because, in addition, he was required to take back with him, part way, the pile driver outfit, and all the way the crippled engine billed to the repair shop at Paducah. So far as his returning to Paducah was concerned and his duty so to do, it was not affected in the slightest degree by virtue of the fact that he was required to do the work described while making such return run. In view of the fact that he had daily taken interstate trains from Paducah to Fulton, and had never handled any other character of trains, it seems to follow as an irresistible conclusion that his return to Paducah had to do directly with and formed a part of the perparation for the movement of the next interstate train due to leave Paducah on the following day. But, in addition, it is quite clear that he was returning to Paducah so as to be at the initial point after delivering an interstate train. We repeat, that the interstate character of his employment would remain with and follow him until he had reached and left his engine and cars in the yard at Paducah.

In the Lamphere case, above cited, it appears that Lamphere was a locomotive fireman; that he was not engaged

in active work in firing his engine at the time the accident occurred; that he was simply walking through the yards to the station pursuant to orders, and for the purpose of boarding a train and riding to a distant point. When he reached that point, then his orders were to fire an engine constituting part of an interstate train and assist in moving the same. This train had been held up on account of the sixteen hour law. Probably it was already made up. But Lamphere's character as an interstate servant did not arise from the fact that the train was already made up and awaiting his arrival. It arise from the fact that he was on his way to the place in question under orders for the purpose ultimately of assisting in the movement of an interstate train. In the case at bar, the defendant in error had moved an interstate train from Paducah to Fulton and was returning under orders direct to the starting point, which he was required to do without reference to the fact as to whether or not he was to move any cars upon such trip. His work with reference to the interstate train he was so moving did not cease until he had arrived at Paducah. There cannot be any difference in principle as to the character of his employment arising from the fact that he was taking his engine and crew back to Paducah after delivering his interstate train. In other words, the character of his employment would be the same whether he was going from Paducah to Fulton for the purpose of getting an interstate train or was returning from Fulton to Paducah after delivering an interstate train. But, in addition, as already said, he was also returning to Paducah with his engine, caboose and crew so as to be ready to take out his regular interstate train on the following day.

In addition, it may be proper to say that, not only did he invariably take interstate train from Paducah to Ful-

ton, but generally, if not always, the trains which he took out of Fulton to the north were interstate in character. The trains which he took out of Fulton were always brought into Fulton from the south, or possibly from Mounds and Cairo, Illinois. These trains would then be picked up and hauled north by the plaintiff and his crew or other turn-around crews (Record Pages 14-16). Speaking with reference to the pile driver and outfit, he found that located in the new yard. The evidence showed that generally cars and trains coming in from the south or from Mounds and Cairo, Illinois, were placed in the new yard. There is nothing in the record to indicate that the pile driver and outfit had not been brought into the new yard from the south or from Cairo or Mounds. In the absence of any attempt on the part of the plaintiff in error to disclose where this equipment came from, it should be held to have been conclusively established that it did come from outside the state of Kentucky and that the defendant in error was simply completing its journey.

Pittsburgh etc. R. R. Co. v. Glinn, 216 Fed. 148, 149.

DEFENDANT IN ERROR, WHEN THE ACCIDENT OCCURRED, WAS ENGAGED IN MAKING OUT HIS REGULAR DELAY REPORT COVERING THE ENTIRE ROUND TRIP.

The fact that the defendant in error, when the accident occurred, was working upon his round trip delay report discloses that he was then actively engaged in the performance of a part of his interstate commerce work. He was required to make out this report. It had to do with the trip from Paducah to Fulton just as much as with the return to Paducah. He usually began making out this report at or near the point of the accident, simply planning

to commence such work so as to have it completed when he reached Paducah. It was an essential part of his duties as conductor. It had to do directly with the movement of the interstate train itself. The performance of this duty cannot be separated from the main act of hauling or moving the train, but must be treated as a part of the whole.

THE RETURN TO PADUCAH WAS NOT WORK BEING DONE INDEPENDENTLY OF THE INTERSTATE COMMERCE IN WHICH THE PLAINTIFF IN ERROR WAS ENGAGED.

The question naturally arises, Was the return from Fulton to Paducah work or an act which was "being done independently of the interstate commerce in which" the plaintiff in error was engaged, "or was it so closely connected therewith as to be a part of it?" Was such return of the defendant in error, his engine, caboose and crew a matter of indifference so far as the interstate commerce so being carried on was concerned?

The above quotations are from Pedersen v. Delaware etc. R. R. Co., 229 U. S. 146, 151.

The answer would seem to be clear and against the contention of the plaintiff in error. There was a regular interstate train taken out of Paducah every day by the defendant in error as conductor. It was essential for him and his engine, caboose and crew to be in Paducah at the proper time so as to take their rest and be ready to handle such train. It is clear he was returning, at least in part, for that specific purpose. That was his regular duty. An injury to him or his engine or caboose or crew tended to delay or prevent the carrying on of such interstate commerce work. Interstate commerce by railroad cannot be

separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole.

See Pedersen case, pages 151, 152.

> "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"
>
> Pedersen case, page 152.

In the Pedersen case the plaintiff was not, at the time he met with his accident, engaged in making repairs upon the bridge in question. He was merely carrying to the place where the work was to be done some of the material to be used therein. But this Court held that "it was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the round house to the track on which are the cars he is to haul in interstate commerce."

Now, in the case at bar, not only was the defendant in error returning to Paducah in connection with and as a part of his trip of hauling an interstate train from Paducah to Fulton, and that, too, without reference to any requirement of hauling any cars back upon such return trip, but he was returning to Paducah with his engine, caboose and crew for the purpose of being there and in a position, after taking the usual rest, to continue the hauling of interstate trains from Paducah to Fulton.

In the case of Horton v. Oregon etc. Co., 130 Pac. Rep. 897, a case cited by this Court in the Pedersen case, it appears that plaintiff's deceased was employed as a pumper at a station in Idaho; that his work consisted in the opera-

tion of a pumping plant for the purpose of supplying locomotive engines with water; that he lived about three miles from the pumping station; that it was necessary for him to go to the plant daily; that for this purpose the company furnished him with a small hand car, called a "speeder"; that on the day of the accident he was riding on his speeder from his home to the pumping station for the purpose of engaging in his regular work; and that, while so riding, he was killed through the negligence of the company. The Supreme Court of the state of Washington there held that he was employed in interstate commerce work at the time he met with his accident, and says on page 901:

> "Was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such (interstate) commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in the interstate commerce conducted by the master * * * must have ceased altogether. This demonstrates the 'real or substantial' connection of his employment with such commerce."

Apply the substance of the language in the above quotation to the case at bar. Not only was the return of the defendant in error to Paducah an essential part of his interstate trip out of Paducah, but failure on his part to return with his engine, caboose and crew would necessarily result in the crippling of the movement of the interstate trains out of Paducah, which the defendant in error was in the habit of handling every day. The crippling of the defendant in error would have stopped the running of such interstate trains until and unless his position could have been filled by another conductor.

THE MOVEMENT OF THE PILE DRIVER OUTFIT WAS INTERSTATE COMMERCE WITHIN THE MEANING OF THE FEDERAL ACT.

The pile driver outfit belonged to the plaintiff in error and was one of its instrumentalities constructed and designed exclusively for the specific purpose of keeping and maintaining the bridges and trestles of its interstate road in proper condition for use. It was found by the defendant in error in the new yard. It was billed to Mayfield, Kentucky. It was taken to Mayfield for the purpose of being used in making certain repairs upon what was known as the Mills Spur, a track connected directly with the main line. It was in fact so used, after being brought to that place by the defendant in error. Hence, it appears without dispute that, upon his return to Paducah, he brought back to Mayfield an instrumentality of the company for the specific purpose of having it present at a place upon one of the tracks of the defendant, so that it could be there used for repair purposes. Was not this act employment in interstate commerce as clearly and logically as was that of Pedersen in carrying the sack of bolts to a bridge, so that those bolts would be present and ready to be used in making repairs? The defendant in error was bringing the tools with which the work was performed, and Petersen was bringing material to be used in the repair work. If a work train crew had performed this work for the specific and only purpose of placing the instrumentality where it could be used and for the purpose of having the same used, such men would be interstate servants within the meaning of the act. Does it make any difference in principle that the defendant in error did not make the trip solely for that purpose, but performed the

work in connection with and as a part of his return trip to Paducah? The answer would seem to be clear to the effect that, in principle, it was the same.

Then, again, in this connection, we call attention once more to the fact that the roads running into and out of Fulton were two in number, both belonging to the plaintiff in error, both interstate in character, and that from the entire record it appears that trains and cars coming into Fulton from the north and south generally, if not always, were interstate trains. Cars coming in from the south as well as those coming in from the north, were generally placed in the new yard. Trains and cars coming from Cairo and Mounds, Illinois, were likewise generally placed in the new yards. This outfit was found in the new yards. The conclusion would seem to necessarily follow, in the absence of proof to the contrary, that this instrumentality was brought into Fulton from some other state than Kentucky, and that the defendant in error was called upon to complete its journey to Mayfield.

See Pittsburgh etc. Ry. Co. v. Glinn, 219 Fed. 148, 149.

But it will be claimed that, whatever the character of the movement of the instrumentality in question may have been, the defendant in error was not moving the same at the time the accident occurred. But that is immaterial. He brought an interstate train from Paducah to Fulton, and was required to return to Paducah, as above stated. In addition to such requirement, he was called upon to take back part way this instrumentality, the movement of which was interstate in character. Having done so, and having left it, and continued on his return trip to Padu-

cah, it would seem to follow that the interstate character of his employment would continue and remain with him. If he had been sent out from Paducah with an engine with specific orders to pick up and take back the instrumentality to the point described and for the purpose designated, and then to take his engine back to Paducah, there could be no question as to the interstate character of his employment during the entire trip. He certainly would be an interstate servant on his way to that place to get the interstate instrumentality. Necessarily he would continue to be an interstate servant, while returning to his starting point, after completing the work. So here, if his employment was interstate in character by virtue of the movement of the instrumentality referred to, then that character remained with him after he had uncoupled from the same and was proceeding on his way back to Paducah.

See Erie R. Co. v. Jacobus, 221 Fed. 335.

THE MOVEMENT OF THE CRIPPLED ENGINE TO THE PADUCAH SHOPS FOR REPAIRS WAS ALSO INTERSTATE IN CHARACTER.

While the crippled engine was able to generate power enough to move itself, nevertheless it constituted a part of the train under the charge and control of the defendant in error. It was billed to the Paducah shops. Defendant in error's engine was the one hauling and controlling the train in question. It is immaterial that the crippled engine was also working steam sufficient to move itself. The defendant in error, as conductor, had charge of the same and was taking it back to Paducah to the shops. It necessarily follows that it was going to the shops solely for the

purpose of having its crippled condition removed so as to place it in a fit and proper shape for use. This engine had been in use for months immediately prior to this accident as a switch engine in the Fulton yards, and necessarily was used continuously in the moving and handling of interstate commerce cars. Any mechanic working upon or about such engine and repairing the same at Paducah would be an interstate servant within the meaning of the federal act.

Northern Pacific Ry. Co. v. Maerkl, 198 Fed. 1.
Boyle v. Pennsylvania R. Co., 228 Fed. 266.
Pedersen v. D. L. & W. R. R. Co., 229 U. S. 146.

We refer to the Pedersen case at this time principally for the reason that it cites the Maerkl case with approval. In the Maerkl case it appears by stipulation that Maerkl was engaged at the time the accident occurred in making extensive repairs upon a freight car, which had theretofore been used by the company indiscriminately in both classes of traffic, and which, when repaired, was to be returned to such use. It was held that he was employed at the time he was repairing the car in interstate commerce.

In the Boyle case, it was held that an employe simply engaged in the work of inspecting a purely intrastate train was not employed in interstate commerce work, even though it was advertised that such train would make connections with interstate trains at a certain point. But we cite the Boyle case only for the reason that, in the opinion, there is found a complete and clear statement of the reasons for holding that an employe such as Maerkl was employed in interstate commerce, while engaged in repairing cars. If men, while so employed, are to be held as em-

ployed in intertsate commerce, and it is clear that such holding is sound in principle, then any person engaged in the act or work of moving or bringing such car or locomotive engine to the point where such repairs can be conveniently and efficiently made is also employed in interstate commerce. It is immaterial whether the movement of the engine is a long distance or a short distance. So long as the sole purpose of the movement is to have such instrumentality at the point where it can be repaired, then the movement of such engine or instrumentality is a part of the work necessary for the preparation of such engine or instrumentality for further use in interstate commerce. The defendant in error was moving this crippled engine to Paducah and the shops, and clearly the only purpose of such movement was to enable it to be repaired and placed in fit condition for use. It would seem to following inevitably that the work performed in connection with the movement of the engine to the shops was interstate in character as fully and completely as would be the work of a mechanic in making the actual repairs.

If it be contended, or if the Court should hold, that the movement of the pile driver outfit and the locomotive engine was not commerce at all, then it would seem to follow logically that, in no event, can it be claimed that the defendant in error had been taken away from interstate employment. He certainly, if the above should be the holding of the Court, was not engaged in intrastate commerce, so far as the movement of the pile driver and engine is concerned. The situation then would be simply that he was completing the movement of the interstate train from Paducah to Fulton, by returning to the initial point where he was required to go, and where he had to be in order to

continue his interstate operations. If the movement of the pile driver outfit and engine should be held not to be commerce at all, then the character of the employment of the defendant in error at the time he met with his accident cannot be said to have been changed by virtue of the fact that he was transporting the crippled engine, and had been transporting the pile driver outfit, any more than it would have been changed, had he been required, when returning to Paducah, to carry back with him on his caboose parcels of company material or company property not used in commerce at all. In fact, it is quite evident that the character of his employment was not changed by virtue of the fact that he was hauling the engine and pile driver outfit, even if the movement of the same be treated as commerce, any more than it would have been changed under the conditions above referred to.

It is respectfully submitted that the judgment of the state court should be affirmed.

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